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THE

TEXAS CIVIL APPEALS REPORTS

CASES ARGUED AND ADJUDGED

IN

THE COURTS OF CIVIL APPEALS

OF

THE STATE OF TEXAS

DURING

THE EARLY PART OF THE YEAR 1901

A. E. WILKINSON,
REPORTER TEXAS SUPREME COURT

B. R. WEBB,
ASSISTANT REPORTER FOR THE COURTS OF CIVIL APPEALS

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TEXAS CIVIL APPEALS REPORTS.

FIRST DISTRICT, 1900.

GRIGSBY LEGATEES v. ESTATE OF NARCISSA WILLIS.

Decided October 24, 1900.

Will—Codicil—Paper Held Testamentary and Not Undelivered Deed.

A testatrix duly executed a will, and in connection with it there was offered for probate, as a codocil, a separate paper, signed by her, reciting briefly that she that day gave to her daughter, O. W., her residence place, to have and to hold forever in her own right. This paper was in the handwriting of the testatrix and was acknowledged by her before a notary, and after her death was found in an envelope among her valuable papers, and on the back of the envelope was an indorsement in her handwriting and signed by her, as follows, "For O. W. at or after my death." Held, that the indorsement should be considered in connection with the instrument to which it referred, and so considered the paper was in legal effect a codicil, and not an undelivered deed of gift.

Appeal from Galveston. Tried below before Hon. E. D. Cavin.

Geo. E. Mann, for appellants.

Lovejoy, Sampson & Malevinsky, for appellee.

GILL, ASSOCIATE JUSTICE.—In this cause the executors named in the will of Narcissa Willis, deceased, offered the will for probate in the probate court of Galveston County, and in connection therewith they offered for probate, as a codicil, a paper in the handwriting of and signed by deceased, together with an indorsement on an envelope also written and signed by her.

R. M. Willis, a son, not named either in the will or proposed codicil, opposed the probate of the formal will, and asked instead that the instrument offered as a codicil be probated as the last will of decedent.

Mrs. Olive Walthew, a daughter of testatrix, and named as beneficiary both in the formal will and in the paper offered as a codicil, joined in the prayer for the probate of both, but joined in the prayer of R. M. Willis for the probate of the second paper, should the probate of the formal will be refused.

The Grigsby legatees, being Mrs. Kate E. Grigsby (a daughter of testatrix) and her children, insisted on the probate of the formal will, but contested the probate of the paper offered as a codicil, on the ground that it was not testamentary in its character, but was merely an undelivered deed of gift.

The County Court admitted both instruments to probate. On appeal of R. M. Willis and the Grigsby legatees the District Court rendered a like decree. From so much of this decree as admitted the second paper to probate as a codicil, the Grigsby legatees have appealed to this court, and here insist that the instrument is not testamentary in its character, but a simple deed of gift, and assign error on the part of the trial court in admitting it to probate.

The instrument in question is as follows:

"GALVESTON, Texas, Nov. 18.

"I, Narcissa Willis, this day give to my daughter Olive Willis Walthew my residence on Broadway and all pertaining thereto, to have and to hold forever in her own right.

(Signed) "NARCISSA WILLIS."

Subsequent to her death, this instrument (which for convenience will be hereinafter referred to as "the codicil") was found in an open envelope among the valuable papers of decedent. It was in her own handwriting, and was signed by her. It was attested by two witnesses, and acknowledged December 1, 1897, before a notary public, under the circumstances hereinafter detailed. Written on the back of the envelope in which it was found was the following indorsement, in pencil, in the handwriting of and signed by decedent, viz: "For B. Olive Walthew at or after my death." This, for convenience, will hereinafter be referred to as "the indorsement." The facts antedating, attending, and following the execution of the codicil will be related in the order of their occurrence, as evidenced by the findings of fact prepared by the trial judge.

R. S. Willis died testate in 1892, leaving his wife, Narcissa Willis, and the children hereinafter named, surviving him. At the time R. S. Willis made his will his wife, Narcissa, also made a will, but its provisions are not disclosed by the evidence. This will she had prepared by a lawyer.

At the date of her husband's death Narcissa Willis owned about $750,000 worth of property, consisting of stocks, bonds, negotiable paper, lands, etc. From the date of his death she directly and through agents managed her property and transacted the business connected with its management, and at all times manifested remarkable strength of mind and an unusually clear understanding of her property interests and business affairs generally and in detail. She made close inquiry into all that was done. In 1897 she turned over the management of her estate to the Texas Guaranty and Trust Company, but up to the time of her death her mental vigor was unimpaired, and she fully knew the condition of her business affairs and what was being done with reference thereto.

Within the three years next before her death she signed and acknowledged between two hundred and fifty and five hundred deeds to land and releases of liens upon lands, each time inquiring into and comprehending the details of each transaction. Between the death of R. S. Willis in 1892 and the beginning of the year 1895, she made a will which she procured to be written by one Lawson, an employe of P. J. Willis & Bro., a concern in which she owned an interest. The nature of the provisions of this will do not appear. In 1895 Mrs. Willis showed this will to C. H. Jones, another employe of said firm, explained in detail the changes she desired made, and desired him to write a will embodying her wishes. This he did, but she rejected his draft. He rewrote it, and she approved and executed it. By the terms of this will her residence on Broadway was bequeathed to her daughter, Mrs. Walthew. She frequently stated to Jones that she intended that Mrs. Walthew should have her residence after her death, but always expressed the purpose to retain the ownership of it until her death. Upon the death of one of the executors named in the will last mentioned, she called upon Jones to write her another will, which he did, and she executed it. In this will her residence was again bequeathed to Mrs. Walthew. Soon thereafter Jones suggested to Mrs. Willis that he objected to taking the responsibility of writing her will, and suggested that she procure the best legal talent for the purpose. Acting upon this suggestion she afterwards, but prior to May 10, 1895, had R. V. Davidson, a lawyer of Galveston, to prepare a will for her, which was done after careful and minute instructions from her. In this will she did not bequeath the home on Broadway to Mrs. Walthew, nor was any specific disposition made of it. On the 30th day of September, 1897, she executed yet another will which had also been drawn by said Davidson in pursuance to the instructions of Mrs. Willis, and this will fails to bequeath the home place to Mrs. Walthew, or to specifically dispose of it. This last is the will which was admitted to probate in connection with the codicil hereinbefore named. Mrs. Willis and her attorney had repeated consultations with reference to this will before it was drafted, and after it was brought to her by him she kept it until the following day for the purpose of carefully inspecting it, and on that day, being satisfied with its terms, she executed it according to the forms of law, with two of the trusted employes of P. J. Willis & Bro. as witnesses. She then placed it in the hands of Davidson for safe keeping, and he placed it in an iron safe, where it remained until after the death of the testatrix.

At the time of the execution of said last named will she had four living children, viz., Kate E. Grigsby, B. Olive Walthew, S. A. Willis, and R. M. Willis, and eleven grandchildren, whose names are set out in the trial court's findings, but need not be given here. R. M. Willis took nothing under this will, having been provided for fully during the life of the testatrix. Deceased was frequently heard to say up to within a year of her death that she intended Mrs. Walthew to have her residence at her death. In the spring of 1899 deceased made inquiry as to what the

home place could be sold for, and learned that though it cost $150,000, it would not bring on the market $25,000.

One Artz, a notary public who was in the habit of going to Mrs. Willis to take her acknowledgment to deeds, went to her residence on December 1, 1897, for the purpose of taking her acknowledgment to some such instrument. After concluding his business and when he was about to leave, Mrs. Narcissa Willis requested him to wait, and leaving the room she returned with a sheet of note paper upon which was written in her own handwriting the codicil hereinbefore set out. Concealing all of the writing except the signature, she said to Artz: "I want you to put one of those things—one of those certificates on this document," referring to the writing. Artz, after learning that she wished to acknowledge the paper and that it affected real estate, informed her that he would have to see its contents in order to make a record of it. She replied that she did not wish anyone to know its contents, as it was a "sacred document," and would be known at the "proper time." When Artz convinced her that it was necessary for him to know the nature of the paper, she assented, exacting from him a promise that he would tell no one. It was already signed in her own handwriting when she brought it into the room. She acknowledged it as she would a deed. Artz and Miss K. E. Sanders signed as witnesses. Artz took the paper home with him to append his certificate and seal, and, having done so, returned it to Mrs. Narcissa Willis in a sealed envelope addressed to her. Nothing more was heard of this paper until it was found among her papers after her death. When found it was in the same envelope in which Artz had placed it, and on the envelope was written the indorsement hereinbefore set out. This indorsement was in the handwriting of Mrs. Willis, and was signed by her. It bore no date, nor is there anything by which the date can be fixed, except that the indorsement was made between the date of the acknowledgment and her death. The trial court found fully and in detail the facts attending the discovery of this paper and envelope, but we deem nothing further in that connection material to be stated here. Mrs. Willis died while on a visit to her son, R. M. Willis, at his home in Englewood, N. J. The tin box in which the codicil and indorsement were found she had with her in New Jersey, and just after her death Miss Sanders handed the box to R. M. Willis, stating that it had belonged to his mother, and requesting him to deliver the box to J. P. Alvey, at Galveston, the general manager of the Texas Guaranty and Trust Company, which he did.

The formal will disposed of the entire estate, and that it was properly probated is conceded on this appeal. The paper which was probated as a codicil, if valid as such, has the effect to withdraw from the operation of the terms of the will the Willis residence on Broadway in the city of Galveston, and to pass it absolutely to Mrs. Walthew.

Appellant contends that the instrument is and purports to be nothing more than a deed of gift, based on the consideration of relationship and affection, and as such, if delivered, would have passed title at once to

the grantee. That the indorsement on the envelope can at most be held to postpone the use and enjoyment of the property conveyed, retaining a life estate in the grantor, and that the instrument with the indorsement written in it, instead of on the envelope, would nevertheless be a deed, and not a will, and never having passed out of the grantor's possession, is without effect.

Considered alone, it is clear that it is a deed of gift pure and simple, has none of the elements of a will, and had it been delivered during the lifetime of the testatrix, would have instantly and effectively passed title to the donee. Or had it been delivered by the grantor to some person other than the grantee, with absolute instructions to deliver to the donee at or after the grantor's death, it would have become operative immediately upon delivery to the donee, and could not have been revoked by the grantor after she had parted with its possession.

The disposition of this appeal must then depend upon the effect that ought to be given to the indorsement found upon the envelope, read in connection with the contents of the envelope to which it plainly refers. That it may be read in connection with the paper to which it refers is well settled, it having never been required that a will should be written upon one paper, or, if written upon several pieces, that the various papers should be actually connected or fastened together. Fosselman v. Elder, 98 Pa., 159. Nor is it necessary that a will should be written in any particular form. Papers in the form of absolute deeds have been held to be valid wills, if from the entire instrument might be fairly gathered a purpose on the maker's part to dispose of his property after his death. Nor is it necessary that the testator be conscious that he is making a will, or a paper that would be technically upheld as such. It is sufficient that the effect of his expressed purpose is to devise his estate or a part of it, and that the instrument by which it is undertaken is revocable in its nature. "Whether the maker would have called it a deed or a will is one question. Whether it shall operate as a deed or a will is a distinct question, which is to be governed by the provisions in the instrument." Schoul. on Wills, sec. 272. Should he undertake to devise by means of a deed, call the instrument a deed, actually believe at the time that acknowledgment and record were necessary to its validity, yet if no present interest is passed, and the expressed purpose of the maker is that the instrument is to take effect at death, the courts will give effect to such instrument and not allow the purpose of the decedent to fail.

In a California case, In re Skerrett's Estate, 67 California, 585, the court gave controlling effect to a letter addressed to the devisee, found in an envelope with copy of an absolute deed, which conveyed to her certain property, though the rather vague testamentary words were found in the letter and were entirely absent from the copy. The original of the deed had never been delivered.

On the other hand, one who wishes to control the disposition of his estate after his death must adopt some lawful means for the accomplishment of his purpose. So, if a deed of gift devoid of testamentary words

be found among the valuable papers of decedent, it can not be given the effect of a will, even though it should be shown by parol that the maker believed and intended it as a will. To adopt such a rule would be dangerous, because of the law requiring delivery of deeds to render them effective. The maker of a deed is presumed to know that delivery is necessary to its validity, and so long as he retains possession is presumed not to have finally decided to execute it. If undelivered deeds found in possession of the maker at death could be established as wills by resorting to parol proof of the maker's wishes, it would open the door to fraud, and serve to defeat the purpose of the statutes requiring wills to be in writing and prescribing certain safe modes of proof. Stillwell v. Hubbard, 20 Wend. (N. Y.), 46.

For a similar reason parol evidence may not be resorted to for the purpose of engrafting on a will the wishes of the testator not expressed in the writing, nor to change, modify, or eliminate any of its material provisions. 1 Jarm. on Wills, 409.

The rule governing the extent to which parol evidence may be resorted to in the construction and enforcement of such instruments is thus stated by Mr. Jarman: "Extrinsic evidence is not admissible to alter, detract from, or add to the terms of a will, but may be used to rebut a resulting trust, or to remove a latent ambiguity arising from words equally descriptive of two or more subjects or objects of gift." Jarm. Rules of Con., rule 8; 1 Redf. on Wills, 426, note. The question here is, what does the language of the maker mean, it being admitted that the language of the instrument is the language of the maker? We think it clear, therefore, that the rule applies to the present inquiry. Whatever then may be the fair inference to be drawn from the mass of parol evidence adduced without objection upon the trial of this cause, it can not be given the effect to transform the instrument in question into a will if a deed, nor into a deed if a will, but may perhaps be useful under the rule that it is permissible to read such instruments in the light of the environment of the maker. Schoul. on Wills, sec. 273. What meaning can then be fairly gathered from the indorsement on the envelope, read in connection with the inclosure to which it refers? The language of the inclosure is such as is usual in a deed of gift, though much more concise than deeds are usually written. The word "give" is not inappropriate to a will. The expression "I this day give" becomes of no significance when read in connection with the indorsement, because the latter, if properly treated as part of the instrument inclosed, limits those words, and clearly evinces a purpose that no effect shall be given to the writing until the maker's death.

"A will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature ambulatory and revocable during life." 1 Jarm. on Wills, 17.

We think in this case the maker, at the time the indorsement was written on the envelope, clearly undertook to dispose of a part of her property after her decease. Whatever may have been her intention when

she acknowledged the instrument before the notary, it is plain that she subsequently decided to limit its terms so as not to deprive her of absolute control during her life. When the indorsement was made she thereby made the inclosed writing a part of her wish thus expressed in writing and thereby destined the property her daughter, Mrs. Walthew, after the maker's death. That she may have believed it would operate as a deed, and escape the necessity of probate, is immaterial, if the intention to devise is evidenced.

Had the indorsement been written in the deed and above her signature, it would have equally conveyed an intention that the paper should take effect only after her death. While it might in that form have been capable of being construed as a deed to take effect in futuro, it could not on principle have been held to convey the property in remainder, retaining a life estate in the donor, for no such purpose is shown by the language if thus arranged.

"The great criterion of a testamentary disposition is that by intendment it takes effect at the death of the maker, vesting no earlier interest in the beneficiary." Schoul. on Wills, sec. 274, p. 282.

It can hardly be questioned that it was the desire and purpose of Mrs. Willis at her death to give this property to Mrs. Walthew, and this purpose may safely be gathered from the writing itself, without resorting to parol, though the parol evidence adduced strengthens this conclusion. There is no allegation of fraud. No question is made as to the genuineness of the papers, or that they were written and signed with the decedent's own hand.

Many of the cases cited by the text writers, and from which they have evolved the rules announced, were decided at a time and in jurisdictions where deeds conveying no present interest, but intended to take effect in futuro (as upon the maker's death) were held invalid, or else construed to be wills when intended to become operative upon the death of the maker. Scoul. on Wills, sec. 276. In this State by our statute (Revised Statutes, article 632) such deeds are authorized. In Chrisman v. Wyatt, 7 Texas Civil Appeals, 40, the instrument in question was based upon love and affection, was in the form of a deed, and was delivered at the date of its execution. It was provided therein that the full ownership and control was reserved in the grantor during his natural life. The court held it a deed and not a will, and the opinion indicates that article 632, supra, had much weight with the court. It is clear that such instrument was not a will, but we think it equally clear that it was a deed with reservation of a life estate, and would have been valid as such independent of the statute. Should the existence of the article cited be permitted to defeat the probate of an instrument fairly appearing to be testamentary simply because it may also be held to come within the terms of the article permitting such deeds to be made? We think not. Nor is it entirely clear that the Legislature intended by the provisions of said article to include instruments which conveyed no present interest, and

became operative only on the death of the maker. Courts have not infrequently accorded great weight to the fact that the maker retained possession of the paper, and have permitted that fact to give to the instrument the revocable character which the language employed failed to supply. Schoul. on Wills, sec. 268, p. 276. But it is difficult to determine from the authorities just what weight should be given this fact, or whether it is proper to allow it to control in any case.

We are aware that the question presented is one of great difficulty. We have been impressed with the force of appellant's contention that it can not be ascertained with certainty whether the maker, regarding the instrument as a deed, decided after making the indorsement that she would not give it effect by delivery, and died in that state of mind. We think, however, that her intention in that respect may be fairly inferred from the circumstances of her retention of the instrument among her valuable papers; that she expected it to be found, and that it would serve to accomplish her expressed wish as evidenced by the indorsement on the envelope.

It would serve no useful purpose to undertake a review of the vast number of authorities cited in the able briefs of counsel. Both the "codicil" and "indorsement" were written and signed by the maker, and satisfy our statutory requirements as to holographic wills, and since it did not revoke her prior will by which her entire estate was devised, it was in legal effect a codicil and properly probated as such. Fosselman v. Elder, supra.

We are of opinion that the judgment of the trial court should be affirmed.

Affirmed.

Writ or error refused.

THOMAS A. DAVIS v. HOUSTON & TEXAS CENTRAL RAILWAY COMPANY.

Decided October 12, 1901.

1.—Carrier of Passengers—Connecting Lines—Liability of Initial Carrier.

Where a railway company sells to a passenger a through ticket over its own and connecting lines, stipulating that it acts only as agent for the other lines, its contract of carriage is complete when it has safely transported the passenger and delivered him at its depot at the point of connection with the next line, and it can not, after a reasonable time has been allowed the passenger for departing from the depot, be held liable on its contract of carriage for any act occurring thereafter.

2.—Same—Misdirecting Passenger—Only Ordinary Care Required.

Where a railway company's contract of carriage with a passenger, holding a through ticket over connecting roads, has ceased by virtue of his delivery at its depot, it is liable for the mistake of its agent there in directing the passenger to a wrong train for the continuance of his journey only in the event of want of ordinary care on the part of the agent.

3.—Same—Negligence Is Question for the Jury.

A requested charge making the act of the carrier's agent, in giving the pas-

senger erroneous information as to which train he should take next, negligence per se, is properly refused, since it is for the jury to determine whether or not such act was negligence.

Appeal from Harris. Tried below before Hon. William H. Wilson.

Ryan, Brown & Lowry, for appellant.

Baker, Botts, Baker & Lovett and *Frank Andrews,* for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellant brought this suit for himself and as next friend of his five minor children to recover of appellee damages for injuries alleged to have been sustained by appellant's wife and said minor children through the negligence of appellee's servants. Plaintiff's petition alleges that on the 6th day of October, 1898, said wife and children were at the town of Georgetown, in Williamson County, Texas, and were desirous to go to the town of Beaumont, in Jefferson County, Texas; that the said wife purchased a ticket from the International & Great Northern Railway Company's agent in Georgetown entitling her and her said children to continuous transportation over that line to Austin, Texas; over the line of the Houston & Texas Central Railway Company from Austin to Houston, Texas, and from Houston to Beaumont, Texas, over the line of the Texas & New Orleans Railway Company by continuous passage, and that said agent was the duly authorized agent of all three of said railway companies in selling said ticket; that said passengers were safely carried from Georgetown to Austin over the line of the International, and from Austin to Houston over the line of appellee railway company, and disembarked at appellee's Grand Central depot in Houston, Texas, and entered same to wait the departure of the Texas & New Orleans Railway Company's train for Beaumont; that while waiting in said depot they were approached by appellee's night depot master, who inquired of them their destination, and they informed him they were going to Beaumont, Texas; that he then left them and returned to them shortly afterwards and informed them that their train was ready to receive passengers, and he then and there proceeded to assist them to board a train pointed out to them by him as being the proper train to take them to their destination; that plaintiff's wife and children were unaccustomed to travel, were strangers in Houston, and did not know what train to take in order to reach Beaumont, nor which direction it should be headed to go there; that the passenger trains of five or six railways arrived and departed from said depot to and from various parts of the State, and that among other things it was the duty of appellee's said night depot master to assist and direct passengers upon the proper trains for their respective destinations; that they relied upon his knowledge and efficiency. The train they were placed upon by said depot master, at about 9 o'clock at night, was in fact a train of appellee's bound north; that this fact was unknown to them

until the conductor came to take up their tickets and informed them; that they then demanded to be taken back to Houston, where they expected to meet Thomas A. Davis, appellant; that instead thereof they were carried to Hempstead, in Waller County, Texas, where they were compelled to remain in appellee's depot until the next morning, when they were returned to Houston; that by reason of their discomfort, fright, and exposure to cold damp air at said depot during the night at Hempstead, they were rendered sick and suffered much physical and mental pain and were permanently injured.

In answer to plaintiff's petition appellee set up by way of defense a general denial and contributory negligence on the part of said wife and children.

Upon a trial of the case before a jury in the court below a verdict and judgment were rendered in favor of appellee, from which judgment this appeal is prosecuted. There is but one question presented for our consideration on this appeal, and that is whether or not the relation of passenger and carrier existed between plaintiff's wife and children and the appellee at the time she alleges she was put upon the wrong train by appellee's depot master at its depot in the city of Houston. The facts bearing upon this issue, briefly stated, are as follows: The plaintiff's wife purchased from the International & Great Northern Railway Company, at Georgtown, Texas, a coupon ticket in the usual form, which entitled her and her children to passage over the International & Great Northern Railroad from Georgetown to Austin, over the appellee's railroad from Austin to Houston, and over the Texas & New Orleans Railroad from Houston to Beaumont. The coupon over appellee's road is marked, "H. & T. C. Co. Austin to Houston, void if detached." The ticket stipulated that the International & Great Northern Railroad Company acted only as agent for the other lines in selling said ticket. Appellant's wife and children took passage on appellee's train at Austin on the 6th day of October, 1898, and were safely transported to Houston, at which place they arrived and were delivered at the Grand Central depot at 7 o'clock p. m. of the day on which they left Austin. Upon arrival at said depot appellant's wife inquired of the ticket agent when the next train on the Texas & New Orleans Railroad would leave Houston for Beaumont, and was told that her train would not leave until the next morning. At that time the Texas & New Orleans was running but one train a day from Houston to Beaumont, which train left Houston at 5:20 o'clock a. m. This information was given appellant's wife the second time between 8 and 9 o'clock that night by the general superintendent of the depot building, who also informed her that she could remain in the building during the night if she so desired. She remained in the building until about half-past 10 o'clock, when she testifies that appellee's depot master came into the waiting room and told her that her train was ready and accompanied her out of the waiting-room and assisted her on a train which she supposed was the Beaumont train, but which in fact was a train on appellee's road going north. She did not

discover her mistake until the conductor demanded her ticket some time after the train left Houston, and she then asked that she be taken back to Houston. This the conductor declined to do, but took her on to Hempstead where she got off on the advice of the conductor and remained in the depot at that place until the next train on appellee's road going to Houston arrived at Hempstead. When the conductor put her off at Hempstead he gave her a note to the conductor on the next train south bound, and she was carried on this train back to Houston, at which place she arrived about 6 o'clock on the morning of the 7th of October, 1898.

The Grand Central depot at Houston, while owned by the appellee, was in common use as a joint depot by appellee, the Texas & New Orleans Railroad Company, and some six or seven other railway companies. The business of the depot master was to look after trains of all railroads using said depot while their trains were at the station, and there was no difference in the duty he owed in this regard to each of said roads, though he was paid for his services by the appellee. The Texas & New Orleans Railroad Company received and discharged its passengers at said depot, and the employes there performed exactly the same services for it that they did for appellee. There was no complaint on the part of appellant of any mistreatment of his wife and children on the trip from Houston to Hempstead, nor on the return trip, nor while they remained at the depot at Hempstead, the only complaint being that they suffered from cold and exposure. The evidence was conflicting as to whether or not appellant's wife was put upon the wrong train by appellee's depot master, and also as to whether she and her children sustained any injury. These issues and the issue of contributory negligence were properly submitted to the jury by the charge of the court, and in this respect the charge is not assailed.

Appellant's first assignment complains that the trial court erred in charging the jury that "the contract of carriage by the Houston & Texas Central Railroad Company was complete when it had safely transported plaintiff's wife and children from Austin and had delivered them at its depot in Houston, and it can not be held liable on its contract of carriage for any act occurring thereafter."

The contention of appellant is, that the appellee would be liable as a carrier to a passenger under said contract, for any injuries the plaintiff's wife and children may have suffered by reason of being misguided and misinformed while remaining in said depot at Houston under care of defendant's agents and servants for the purpose of continuing their journey on a connecting line of railway running trains out of defendant's said depot, said erroneous information being given by one of appellee's servants. While this charge may not be perfectly accurate in the abstract, in that it does not allow appellant's wife a reasonable time in which to leave appellee's depot, it was not a misapplication of the law as applied to the facts of this case, because the uncontradicted evidence shows that the alleged wrongful act of appellee's servant, if it occurred at all, occurred several hours after appellant's wife had been delivered at

appellee's depot. The contract of carriage only required appellee to transport appellant's wife and children from Austin to Houston and deliver them at its depot, and this contract was completed when they were so delivered and a reasonable time allowed them to leave said depot. The contention that the relation of carrier and passenger existed between appellee and appellant's wife and children while they remained at said depot awaiting transportation over the Texas & New Orleans Railroad, can not be sustained. The facts show that this depot was the depot of the Texas & New Orleans Railroad Company, where it received and discharged its passengers, and while waiting at said depot to take passage on a train on the Texas & New Orleans Railroad, with tickets entitling them to passage on said road, the appellant's wife and children were passengers of said road, and the relation of passenger and carrier between them and appellee had ceased. Harris v. Howe, 74 Texas, 534; Rozwadosfskie v. Railway, 1 Texas Civ. App., 487; Railway v. Franklin, 44 S. W. Rep., 702; Railway v. Griffith, 12 Texas Civ. App., 631.

Appellant's second, third and fifth assignments attack the charge of the court in applying the rule of ordinary care to the alleged act of appellee's depot master in directing appellant's wife to the wrong train. Our opinion being as stated in our consideration of the first assignment, that the relation of carrier and passenger did not exist between appellee and appellant's wife at the time of the alleged negligent act, the court correctly applied the rule of ordinary care in determining whether or not the act alleged was negligence.

Appellant's third assignment complains of the refusal of the court to submit the following special instruction to the jury: "If you believe from the evidence that plaintiff's wife, Pattie C. Davis, and his children were at the depot in Houston, as alleged in his petition, for the purpose of taking the Texas & New Orleans train for Beaumont upon a through ticket over the International & Great Northern Railway, the defendant's line and the Texas & New Orleans Railway, and if you further believe from the evidence that plaintiff's said wife, Pattie C. Davis, made inquiry and the defendant's said agent failed to give the information, or gave information not true in fact, and by reason thereof said Pattie C. Davis and children were induced to take the wrong train and thereby suffered injury, defendant would be liable, and you will find for plaintiffs."

The court did not err in refusing this instruction, (1) because the main charge had correctly and fully instructed the jury as to appellee's liability for the alleged negligent act of its servants; and (2) because the requested instruction is not the law in that it charges the jury that the act of appellee's servant in giving appellant's wife erroneous information as to the train she should take was negligence per se, when it was a question for the jury to determine whether or not such act would be negligence.

The sixth assignment complains of the refusal of the court to submit to the jury a special instruction requested by appellant, which charged the jury that the appellee was bound to exercise toward appellant's wife

and children the duty of a carrier to a passenger from the time they boarded its train at Austin until it had delivered them to its connecting line, the Texas & New Orleans Railroad, and so long as appellee's servants and employes exercised control over them. The uncontroverted evidence being that the alleged negligent act occurred after appellant's wife and children had been delivered by appellee to its connecting carrier, and that the servants and employes of appellee as such had at said time no control over nor care of appellant's wife and children, the requested charge was not applicable to the facts of the case, and presented an issue not raised by the evidence.

We find no error in the judgment of the court below, and it is affirmed.

Affirmed.

Writ of error refused.

R. H. BARROW ET AL. v. AMOS GRIDLEY ET AL.

Decided November 1, 1901.

1.—Survey—Land Certificate—Location of Alternate School Section.

While the law requires the survey of a railroad land certificate and the alternate survey of a like amount for the State to be contiguous to each other, yet if made apart, they are not void, but only irregular.

2.—Same—Correction—Void Location Upon Appropriated Land.

Where a survey was made so as to cover an excess of land, and afterwards another certificate was located in part on the tract, such second location was upon appropriated land, and was subject to a correction of the prior survey such as fixed it on that part of the land covered by the second location.

3.—Archive of Land Office—Affidavit Explaining Field Notes.

An affidavit filed in the Land Office explanatory of field notes is not an archive of that office so as to make it admissible in evidence, and the fact that the affiant was the surveyor who did the work and was dead when the affidavit was offered does not alter the case.

4.—Land Office Map as Evidence.

A map compiled in the Land Office, and lithographed, printed and published by that office, is an official map, and admissible in evidence for the purpose of identifying the location of surveys.

5.—Judgment—Description of Land.

A judgment by which a party recovers all of a designated survey not in conflict with another specified survey which can be easily identified upon the ground is not void for uncertainty.

Appeal from Brazoria. Tried below before Hon. Wells Thompson.

Masterson & Masterson, for appellants.

Austin & Rose, for appellees.

GARRETT, CHIEF JUSTICE.—Richard H. Barrow brought this suit in the District Court of Brazoria County on April 1, 1897, against T. H. Bennett, H. E. Butler, J. E. Butler, Charles Fiedler, Amos Gridley, and

Henry Schoenler as an action of trespass to try title for the recovery of a certain tract of land situated in Brazoria County, described by metes and bounds, alleging that said land had been located upon as vacant public domain and surveyed for the plaintiff by virtue of a certificate for 1280 acres of land issued to R. H. Wade. On July 14, 1898, H. E. Butler and J. E. Butler answered, disclaiming any interest in the land sued for, and prayed to be discharged with their costs. T. H. Bennet appeared by a plea of general denial and not guilty, filed December 28, 1897. On June 15, 1897, Henry Schoenler answered by a plea of general denial and not guilty. Amos Gridley answered, disclaiming as to all of the land except 320 acres described in the answer, to which he claimed title. He also pleaded the statute of limitation, and improvements in good faith, and against H. H. Wellman, an intervening defendant, on his warranty of title. He also pleaded in cross-action for a recovery of the land of the plaintiff. On January 11, 1900, the plaintiff Barrow filed his second amended original petition in which the entire 1280 acres of the R. H. Wade location was sued for, the original petition describing only a portion thereof. He also alleged that he had conveyed his title to Branch T. Masterson, who had intervened in the suit as a plaintiff, and prayed that he be allowed to recover. Masterson intervened in the suit, and sought to recover the 1280 acres located and surveyed by virtue of the R. H. Wade certificate. H. H. Wellman intervened in the suit as a defendant, and pleaded title in himself and vendees to 640 acres of land known as section 28, Houston Tap & Brazoria Railroad Co., which he described by metes and bounds, and prayed for a recovery of the same. No answer for Fiedler appears in the record. On January 13, 1900, the cause came on to be heard before the court, without a jury, and judgment was rendered, reciting the appearance of all the parties, in favor of Masterson against the Butlers on their disclaimer; in favor of Gridley for the 320 acres described in his answer, and in favor of Masterson against Gridley for the 1280 acres, except the 320 acres; and that the plaintiff Barrow and intervener Masterson take nothing as to the intervener Wellman and the defendants Bennett, Fiedler and Schoenler.

The right of the plaintiff to recover in this case depends upon the true location upon the ground of survey 28 located for the State by virtue of Houston Tap & Brazoria Railroad certificate No. 10-361. There can be no doubt from the evidence that the survey was originally made contiguous to its alternate No. 27; but as originally made it also called for a connection with No. 18, which may be easily identified and located on the ground by its connecting surveys. In making the first block of surveys in 1861, the surveyor made an error which left a vacancy between surveys 16 and 17, and when he came to locate the block in 1868, of which No. 28 is a part, he appropriated by his calls for that survey much more land than the acreage called for. Afterwards, in 1876, the A. C. H. & B. surveys were located in between 28 and its alternate 27,

thus cutting 28 loose from 27, but leaving it a sufficient acreage. In 1890 the plaintiff Barrow located the Wade certificate upon the part of the land appropriated by 28, adjoining 18 and next to 20. Afterwards corrected field notes of 28 were filed in the Land Office, disconnecting it from 27 and locating it as it now appears to be located, and the land was sold by the State and a patent issued therefor. It thus appears in conflict with the Wade location, and the question is whether or not the patent is valid.

While the law requires the two surveys made under a certificate requiring a like amount of land to be surveyed for the State to be contiguous to each other, yet if made apart they are irregular but not void, and surveys thus illegally made have been validated by law. Rev. Stats., art. 4265; Railway v. Carter, 24 S. W. Rep., 1102; Smith v. McGaughey, 87 Texas, 61. At the time the A. C. H. & B. surveys and the Wade survey were made, the land was appropriated by the survey 28, but the field notes of 28 embracing much more land than the certificate called for, corrected field notes were filed, cutting the survey loose from its alternate and leaving it tied onto 18. The survey having previously called for both 27 and 18, the land covered by the Wade location had been appropriated, and the latter survey was made subject to the correction. The corrected field notes appear to have been properly filed in the Land Office, and there is no evidence to show fraud in the erasures and interlineations on the original field notes in the surveyor's office. There is no reason shown why the judgment of the court below is not correct. As the case was tried before the court without a jury, and the conclusion of the court is abundantly supported by the evidence, the judgment will be affirmed. Appellant complains that the judgment is void for uncertainty in the description of the land adjudged to Gridley, but this is not true, because the contention was whether or not No. 28 should be constructed on No. 27 or No. 18. The latter theory having prevailed, it is easy to run out the land by calls for No. 18. There are no conclusions of fact in the record, and as the evidence will support a finding that the plaintiff's survey was located on lands already appropriated, the form of the judgment will not be disturbed, except as to H. H. Wellman, as to whom it will be reformed so that plaintiff take nothing only as to the survey No. 28.

The judgment is affirmed.

Affirmed.

ON MOTION FOR REHEARING.

We are of the opinion that the motion for a rehearing should be overruled. Appellants request the court to file conclusions of fact and of law, but do not indicate any conclusion that they desire that is not included in the opinion heretofore filed. The facts would perhaps have been more particularly stated by us then had we been under the impression

that the Supreme Court had jurisdiction of the case. However, as the case may be one of which the Supreme Court can take jurisdiction, we will make a brief statement of our conclusions separately.

Appellants are the owners of the certificate by which the Wade survey was made as described in the petition, and are entitled in this suit to recover the land described, except such part thereof as may be in conflict with the State survey No. 28 of the Houston Tap & Brazoria Railroad surveys, claimed by the appellees. The plats in the record are referred to. No. 18 of Houston Tap & Brazoria Railroad surveys was located in 1861 in a block of surveys numbered from 1 to 24, and No. 28 was located in another block made in 1868. In making the surveys in 1861, the surveyor made a mistake in the distance between No. 17 and No. 16 on the south of it, the distance being one mile greater than called for or necessary to make the full complement of acreage. Section 17 calls for and ties onto No. 16, thus making No. 17 survey excessive in quantity. Survey No. 18 lies west of No. 17, and calls for and ties onto it, and like it, covers too much land. No. 28 also, as originally surveyed, called for its alternate No. 27, which lay north of it, but on the east it ran south with the west line of 18 to its south corner, and thus formed a survey excessive in distance to the south and containing double the quantity of land to which it was entitled. While in this condition the R. H. Wade certificate was surveyed in conflict with the south end of it. After the Wade survey was made, corrected field notes of No. 28 were filed in the General Land Office, which cut it loose from its alternate 27 on the north and located it as described in the patent, reducing it to its proper size. Reference is made to the record for the field notes of the several surveys and to the corrected field notes and patent for No. 28. Upon the vacancy thus left between No. 27 and No. 28, and to the east, other surveys, known as the A. C. H. & B. surveys, were located. The correction of the original field notes of survey No. 28 was duly filed in the Land Office. In the county surveyor's records the correction appears to have been named by erasures and interlineations in the original field notes, as recorded. There is no evidence, however, to show that this was fraudulently done, nor by whom; nor any explanation thereof. At the time the Wade certificate was surveyed survey No. 28 had appropriated the land now covered by it by calls for the south corner of No. 18, and as corrected and patented conflicts with the Wade location. The exact extent of the conflict is not material to be found, because the defendants only recover for land included in survey No. 28, which can be easily identified by running it out according to its calls.

Passing briefly upon the questions of law raised by the appellants, we conclude:

1. The affidavit of Damon filed in the Land Office explanatory of the field notes was not an archive of that office so as to make it admissible in evidence, even if it were material. It does not come within the rule of the cases cited by counsel. The fact that Damon was dead when

the affidavit was offered, and was the surveyor who did the work, does not alter the case.

2. The map compiled in the Land Office, and lithographed, printed, and published by that office is an official map, and the copy received in evidence was admissible for the purpose of identifying the location of the surveys.

3. There was no error in admiting in evidence the patent for survey No. 28. It was duly issued upon corrected field notes, and showed title to the land from the State.

4. The field notes of the several surveys had been read in evidence from the surveyor's record, and the admission of the skeleton copies from the Land Office was not material error, if error at all, which is not believed to be the case. Only immaterial parts appear to have been omitted.

5. The correction of the field notes of No. 28 separating that survey from No. 27 was only an irregularity which could not affect the validity of the patent, and even this irregularity was subsequently cured by statute.

6. Masterson recovered judgment for all of the Wade certificate not in conflict with No. 28, which can be easily identified on the ground. Hence there is no merit in the assignments of error attacking the judgment as void and uncertain, and for its failure to ascertain the extent of the conflict between the two surveys. Gridley, upon his plea in reconvention, recovered judgment for a defined 320 acres of the survey No. 28; as to the balance of that survey the judgment as reformed is that appellants take nothing as to Wellman.

Writ of error refused.

THE STATE OF TEXAS V. CHRISTIAN JORDAN AND WIFE.

Decided November 20, 1900.

1.—Jurisdiction of District Court—Lien for Taxes—Homestead Allowance.

Where, after the State had sued to foreclose a lien for taxes, the defendant died, and the property, taken by the widow at its valuation, was set aside to her by the probate court in lieu of the allowance for a homestead, the district court had jurisdiction to determine in the tax suit, to which the widow, as administratrix, was made a party, the question of priority between the tax lien and the widow's homestead allowance. Following George v. Ryon, 94 Texas.

2.—Priority of Lien for Taxes Over Allowance for Homestead.

When article 5175a of the Revised Statutes is construed in connection with other articles of the statutes relating to the same subject matter, it does not have the effect to exempt property set apart in lieu of an allowance for the homestead from the lien for taxes due thereon.

Appeal from Galveston. Tried below before Hon. William H. Stewart.

Spencer, Kincaid & Sonfield, for appellant.

Maco & Clegg Stewart, for appellees.

GILL, ASSOCIATE JUSTICE.—This suit was brought by the appellant, the State of Texas, against Christian Jordan and his wife, Mary Jordan, for the recovery of State and county taxes levied and assessed against lot number 5, in block 619, of the city of Galveston for the years 1886 to 1896, inclusive, and for interest and penalties. Appellant also sought to establish and foreclose the tax lien given by law upon the lot in question.

In January, 1899, Christian Jordan died, and his wife, Mary Jordan, having qualified as administratrix of his estate, made herself, as such administratrix, a party defendant to said suit. In bar of appellant's right to foreclose the lien, she pleaded that Christian Jordan, since the institution of the suit, had died intestate and insolvent, leaving herself and a minor child surviving him. That decedent, at the date of his death, owned no estate save the lot in question, which was his separate property. That said lot had been inventoried and appraised at $5000. That in the administration it had been made to appear to the probate court, before which it was pending, that neither she nor her deceased husband had owned a homestead, and the court had thereupon made her an allowance of $5000 in lieu thereof, and ordered the lot sold to satisfy such allowance. That thereupon she had exercised her right to take the lot in question at its appraised value in satisfaction of such allowance, and same had been set aside to her by the probate court free of all liens and claims. She prayed for judgment declaring the lot free from all liens and liability for the taxes sued for. The evidence adduced upon a trial before the court without a jury established the facts alleged by each party, and the trial resulted in a judgment in favor of the State for the sum sued for, but the property was adjudged to the widow and minor child free from the asserted lien.

The State has appealed, and assails this judgment as erroneous in so far as it adjudges the lot free from the lien for taxes levied and assessed against it. The action of the court in overruling the general demurrer to defendant's answer is first assigned as error, and in as much as the facts alleged in defense were established, a determination of the questions raised by this assignment will dispose of this appeal.

In overruling the demurrer the trial court sustained the contention of appellee that article 5175a of the Revised Statutes effectively exempted the property from the tax lien asserted by appellant, because the orders of the probate court constituted it the homestead of the surviving widow. We shall dispose of this appeal upon another ground than the proper construction of article 5175a.

This suit having been brought prior to the death of Christian Jordan, the district court in which it was instituted had jurisdiction to adjudge the validity of appellant's claim, the amount due thereon, to declare

the existence of the tax lien upon the property in question, and to certify the judgment to the probate court for payment in due course of administration. Jenkins v. Cain, 72 Texas, 88. The question of the superiority of the widow's claim for allowance in lieu of a homestead, over the State's claim for taxes due thereon, must be determined in that court. The defense interposed had no proper place in the pleadings of the defendant in this cause, and the general demurrer should have been sustained.

The district court was without jurisdiction to adjust matters affecting the classification of the claim in the probate court. Such questions are peculiarly within the jurisdiction of the probate court, and will arise there when the judgment is presented for classification and payment. Mortgage Co. v. Jackman, 77 Texas, 622; George v. Ryon, recently decided by this court.

There is an apparent conflict between the cases of Jenkins v. Cain and Mortgage Co. v. Jackman, supra, and we have found great difficulty in reconciling them. In the case first cited the cause had proceeded to judgment and foreclosure of lien upon land before the death of defendant, his death occurring before the levy of execution. On presentation the administrator rejected both the claim and the lien, whereupon suit was brought in the district court upon the judgment. The amount of the judgment being beneath the jurisdiction of the district court, the question of jurisdiction was raised. Justice Stayton, speaking for the Supreme Court, held that the cause was properly brought in the District Court, and that having acquired jurisdiction, it properly declared the existence of the lien and certified the judgment to the probate court for classification and payment.

In Mortgage Company v. Jackman, a later case, Justice Gaines, speaking for the court, held that as the claim sued on had been allowed by the administrator, and the lien alone rejected, suit was improperly brought to establish the lien. It was held that as the lien was a mere incident of the money claim, the question of its existence was exclusively within the jurisdiction of the probate court in classifying the claim. No reference was made to the case of Jenkins v. Cain, supra. In this decision the court seems to have given a controlling effect to the language of the statute authorizing suits against an administrator only when a *claim for money* against an estate has been rejected. Rev. Stats., art. 2082.

The distinction between the case cited and the case at bar lies in the fact that this suit was instituted against the decedent in his lifetime, and the administratrix became a party under article 1248 of the Revised Statutes, which provides that upon the death of a defendant the suit shall not abate, but upon suggestion of such death the administrator shall be made a party, after which the cause shall proceed against such administrator and such judgment rendered as may be authorized by law. To such a case article 2082 has no application. The fact that the order making the allowance to the widow has already been entered does

not deprive the probate court of the power to reopen the question and accord to appellant's claim its proper status upon timely presentation. The question as to this claim could not have been up for adjudication when the order was made.

For the reasons given, so much of the judgment of the trial court as adjudged the widow's allowance to be superior to appellant's lien is reversed, and judgment is here rendered establishing the existence of such lien. The judgment is in all other respects affirmed.

Affirmed.

ON MOTION FOR REHEARING.

We have carefully considered the motion for rehearing filed by appellee in this cause, but have found no reason to change our opinion as to the disposition of this appeal. However, in view of the answer of the Supreme Court to certified questions in the case of George v. Ryon, 94 Texas, 317, the court, of its own motion, will consider and dispose of the question of the superiority of the allowance to the widow in lieu of a homestead, over the State's lien for taxes against the real estate so set apart to her.

We held in our former opinion that the probate court alone had jurisdiction to determine that question, it being a matter affecting the classification of the claim, but in answer to questions certified in the case of George v. Ryon, supra, the Supreme Court held that where the district court had once acquired jurisdiction of the cause, it could determine both the existence of the lien and such defenses as could properly be interposed against it. In that case it was held that a homestead claim could be properly interposed. We think it follows that such right as the widow acquired by the order of the probate court in setting apart this property to her as a homestead was properly pleaded in bar of plaintiff's lien, and the district court had jurisdiction to adjudicate the question.

Its correct determination rests upon the inquiry whether article 5175a of the Revised Civil Statutes exempts the homestead or property occupied in lieu thereof from the lien for taxes assessed against it. Article 5175a is as follows: "In all cases where a taxpayer makes an assignment of his property for the payment of his debts, or where his property is levied upon by creditors by writs of attachment or otherwise, or where the estate of a decedent is or becomes insolvent, and the taxes assessed against such person or party or against any of his estate remains unpaid in part or in whole, the amount of such unpaid taxes shall be a first lien upon all such property, provided that when taxes are due by an estate of a deceased person, the lien herein provided for shall be subject to the allowances to widows and minors, funeral expenses, and expenses of last sickness. And such unpaid taxes shall be paid by the assignee when said property has been assigned, by the sheriff out of the proceeds of sale in case such property has been seized under attachment or other

writ, and by the administrator or other legal representative of decedents; and if such taxes shall not be paid, all said property may be levied on by the tax collector and sold for such taxes, in whomsoever's hands it may be found."

If this article stood alone, the action of the trial court might with good reason be upheld, but the article in question much be construed in the light of articles 2055, 2060, 2061, and 5183 of the Revised Statutes.

By article 2055 it is provided that the title of the widow and children to the property and allowances set apart to them, when the estate is insolvent, shall not be taken for the debts of the estate "except as hereinafter provided."

Article 2060 of the same chapter provides, among other things, that the homestead shall be exempt from forced sale for the payment of all debts except purchase money, *taxes due thereon,* and certain other named claims. The article last named is a substantial repetition of section 50, article 16, of the State Constitution.

Article 2061 provides that the exemptions, other than the homestead or allowance in lieu thereof, shall be liable for the payment of funeral expenses and expenses of last sickness, but for no other debts.

By article 5183 it is provided that no real estate set apart or designated as a homestead shall be sold for taxes, other than those due on such homestead.

Article 5086 of the Revised Statutes, enacted in 1876, makes all taxes on real estate a lien on the property against which they are assessed.

It thus appears that all taxes upon real estate constitute a lien against the particular property against which they are assessed. That by the Constitution itself the homestead is not exempt from the taxes due thereon, and that all subsequent legislation has recognized such liability, article 2060 of the Revised Statutes being a practical reiteration of the language of the Constitution on this subject. So that if it might properly be held that there was no constitutional inhibition against exempting the homestead from forced sale for its own taxes, we think it clear that the Legislature has never undertaken to exempt it.

It is plain to our minds that article 5175a, does not amount to an exemption, for it does not undertake to repeal any other legislation bearing upon the subject. Its evident purpose was to aid the State in the collection of her taxes, and it was not enacted for the benefit of individuals. It should be borne in mind that until the last named article was enacted, the State in no event had a lien on personal property for taxes, nor upon real estate except for the taxes due upon each separate piece. The effect of the article was to give the State a lien also upon all the property of an estate or individual (under the circumstances named in the article), so that all the property should be under a preference lien for all the taxes due by the individual or estate, without reference to the particular property against which it was assessed. To impose this new and additional lien upon the homestead and allowances to the widow and

children would have contravened the provision of the Constitution protecting the homestead against all taxes save its own. With this fact kept in view, the necessity for and meaning of the proviso become plain. The exemption was from the new lien created by the article itself. We are of opinion that the court erred in holding that the proviso exempted the allowance from the taxes due thereon. Our former decree is therefore so modified and reformed as to reverse the judgment of the trial court and to here render judgment for appellant, establishing the claim for taxes as sued for, establishing the lien upon the property in question as superior to the homestead allowance, and decreeing that the judgment be certified to the probate court of Galveston County to be paid in due course of administration.

Reversed and rendered.

A. F. LINCOLN v. LULA PACKARD ET AL.

Decided January 15, 1901.

1.—Conversion—Measure of Damages—Market Value.

Where, in an action for conversion, there was evidence tending to show that the goods had a market value at the time of their conversion, it was error for the court to instruct that the measure of damages was their reasonable value.

2.—Same—Insufficient Proof of Market Value.

Proof establishing merely that second-hand furniture of the kind involved in the suit was often sold there by persons desiring to leave the city, or who were forced to sell, at from 10 per cent to 60 per cent of its original value, was not sufficient to show the market value of the property.

3.—Same—Same—Price Paid for Property.

Evidence of what plaintiffs paid for a piano a number of years before could form no basis for the ascertainment of its present value, unless such amount was shown to have been its value at the time of the purchase.

Appeal from Harris. Tried below before Hon. Wm. H. Wilson.

Boyd & Thompson, for appellant.

R. M. Hall and *William H. Crank,* for appellees.

PLEASANTS, ASSOCIATE JUSTICE.—Appellees brought this suit to recover of appellant damages for the conversion of certain personal property described in their petition, and alleged to be worth the sum of $651. The cause was tried by a jury in the court below, and resulted in a verdict and judgment in favor of appellees for the sum of $483, from which judgment this appeal is prosecuted. The court below charged the jury that, in event they found for plaintiffs, they should assess the damages at the "reasonable value of said goods." The appellant by his fourth assignment of error assails this charge on the ground that the evidence in the case shows that the goods had a market value at the time of their

conversion, and the correct measure of damage is the fair market value of said goods at the time of their conversion. We think this assignment should be sustained.

In laying down a rule as to the true measure of damages for any injury to property, the result sought to be obtained by the establishment of such rule is a just and fair compensation for the injury, or, in other words, to make the injured party whole. Hence, our courts have universally held that the correct rule of damage in suits for conversion of property, where the property is shown to have a market value, is the market value of such property at the date of the conversion, with legal interest thereon from said date. Under this rule the injured party would ordinarily be fully compensated for his loss, as he could go into the market and make himself whole by purchasing property of like character as that of which he had been wrongfully deprived. We find nothing in the facts of this case which calls for any deviation from the general rule above stated. Of course our opinion upon this point is predicated upon the correctness of the statement of the witnesses that the property in question in this case had a market value. None of the witnesses swear with any certainty as to what that market value was, and the testimony in the case as to the value of the property does not seem to have been elicited with any special reference to the correct rule of damage, and if it should appear upon another trial of this cause that said property had in fact no ascertainable market value, then the correct rule would be, as stated by the court, the reasonable value of the property. We do not think that proof which only establishes the fact that second-hand furniture of the kind involved in this suit was often sold in the city of Houston by persons who desired to leave the city, or who were forced to sell, at from 10 per cent to 60 per cent of its original value, is sufficient to show the market value of such property; but the proof must show that there is an open market for such property in the city of Houston into which the plaintiffs could go and buy property of like kind as that of which they have been deprived. When this is shown, the correct rule as to the measure of damage, which as before stated is but a rule of compensation, would award to plaintiffs just what it would cost them to replace the property of which they have been deprived by the wrongful act of the appellant, with legal interest thereon from the date of such deprivation.

Under his fourteenth assignment appellant complains of the ruling of the trial court in permitting the appellee, Si Packard, to testify over the objection of appellant as to what he paid for the piano, which was one of the pieces of furniture for the conversion of which this suit was brought. We think the admission of this testimony was clearly erroneous. The learned trial judge, in his explanation appended to the bill of exceptions taken by appellant to the introduction of this testimony, says: "The evidence showed this piano had been in use for a number of years, and the court considered its cost price, in connection with what

amount of wear and tear it had been subjected to, to be circumstantial evidence on the question of proper value to go to the jury." If the property had no market value, and the proper inquiry had been as to its reasonable value at the date of the conversion, it would have been proper to have allowed the jury to consider its value when new in comparison with the wear and tear in order to arrive at its reasonable value at the time of the conversion, but in no event should the jury have considered what appellees paid for the property. They may have bought the property for less than its value, or they may have paid for it a great deal more than its actual value, and the amount paid for it would form no just basis for the ascertainment of its present value, unless such amount was shown to have been its value at the time of the purchase.

We shall not discuss the other assignments of error presented by appellant. If any error is pointed out by any of them, it is not such as is likely to be repeated upon another trial of this cause. For the errors above discussed the judgment of the court below will be reversed and this cause remanded for a new trial, and it is so ordered.

Reversed and remanded.

FIRE ASSOCIATION OF PHILADELPHIA v. HERMANN LOEB.

Decided January 15, 1901.

Negligence—Railway Fires—Burden of Proof.

Where cotton was shipped on an interstate bill of lading which excepted the carrier from liability for loss by fire except from negligence, and provided that the burden of proof of such negligence should be on the shipper, such provisions were met by evidence showing that the fire was communicated to the cotton by sparks from the engine, and a recovery for its loss was warranted unless defendant showed not only a proper equipment with spark arresters, but also a proper handling of the engine.

Appeal from Gregg. Tried below before Hon. J. G. Russell.

Crane, Greer & Lindsey and *Young & Stinchcomb,* for appellants.

F. H. Prendergast, for appellee.

GARRETT, CHIEF JUSTICE.—The appellee, Herman Loeb, brought suit against the Texas, Sabine Valley & Northwestern Railway Company for the value of thirty bales of cotton, alleged to be worth $1029.98, destroyed by fire while in the possession of said railway company as a common carrier for transportation from Longview, Texas, to Shreveport, La. The defense of the railway company was that the cotton was not burned by its negligence; and that by the contract of shipment as evidenced by the bill of lading the plaintiff released the company from any damage to said cotton by fire. The appellant insurance association

was brought into the case by the railway company upon its insurance of the cotton. The association answered, admitting its insurance of the legal liability of the company, but denied that there was any such liability, pleading the same defense thereof as that set up by the company, pleading in addition, however, that the bill of lading also contained the following provision: "It is further agreed that in case said cotton is found, at the point of delivery, to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant, to establish that such injury resulted from the fault of the carrier." There was a trial before the court without a jury, and judgment was rendered in favor of the plaintiff against the railway company for the sum of $1062, and in favor of the railway company over against the insurance association for the sum of $1048 and costs.

The cotton was shipped by the plaintiff, as alleged, for transportation from Longview, Texas, to Shreveport, La. The bill of lading limited the liability of the company to its own line, which ended at Timpson, Texas. The provisions excepting the company from liability for loss occasioned by fire, and as to the burden of proof, appeared in the bill of lading as above stated. Defendant company transported the cotton from Longview to Timpson, where a fire broke out in the car in which the cotton was loaded, and it was destroyed while it was still in the possession of the company. The trial court found that the fire originated from sparks from the defendant's engine which was pulling the train, and that the defense had failed to show that it was not set out by the negligence of the company. These findings were, we think, supported by the evidence. While it was shown that the car in which the cotton was being carried was a new car, and that the doors and windows were closed, cleated, and sealed, it appeared from the evidence that this car was the second car from the engine, and that the top of the car next to the engine, which was loaded with lumber, was rotten and was set on fire by sparks from the engine when the train was about six miles from Timpson. This fire was extinguished by the trainmen. There was a window, closed and cleated, in the end of the cotton car next to the car that caught on fire, and it was shown that the fire in the cotton broke out just below this window, but a little to one side of it. The engine was a wood burner, and had set out fires by sparks escaping from it almost daily for from thirty to sixty days prior to this fire. The witness Alexander testified that it threw more sparks than wood burning engines usually do. There was evidence that the engine was properly equipped with a spark-arrester, approved by railroads as being a sufficient spark-arrester; and that the spark-arrester of the engine was as fine as could be used to allow the engine to steam well. There was no evidence as to handling of the engine, whether it was careful or otherwise.

Let it be conceded that the shipment was interstate, and that the defendant company could by contract limit its liability as a common car-

rier, and also that it could make the stipulation as to the burden of proof of negligence, the result reached by the trial court was correct. With the liability of the company thus limited, the case is one of that class of cases for damages arising out of fires set out by sparks escaping from locomotives. The rule in such cases is that when the plaintiff has shown that the fire causing the damage originated from sparks escaping from the locomotive of the defendant, a prima facie case of negligence is thus established, which is rebutted by evidence showing that the engine was supplied with spark arresters and appliances to prevent the escape of sparks such as are approved and used by railroads generally, and that the engine was carefully handled by the company's agents and employes. Railway v. Johnson, 92 Texas, 591, and cases therein cited. The evidence of the plaintiff, as we have seen, satisfactorily showed that the fire originated from sparks escaping from the engine. The defense failed to rebut this prima facie case of the plaintiff thus made. It failed to show that the engine was properly handled, or that the fire was not set out by its negligence. Although it was shown that the car in which the cotton was loaded was a new car, and that the doors and windows were closed and fastened, other evidence showed that the cotton must have been set on fire by sparks from the burning car next to it, which resulted from the negligent escape of sparks from the engine which had been in the habit of setting out fires almost daily, a fact quite inconsistent with the evidence as to the use of the most approved spark-arrester. The plaintiff had the burden of proof to show the negligence of the company, and sustained it by showing that the fire was set out by sparks from the engine. So the provision in the bill of lading was complied with, whether it was such as could have been enforced by law or not. We deem it unnecessary to notice the assignments of error in detail, or the questions sought to be raised by them further than we have already done. There is no error in the judgment of the court below, and it will be affirmed.

Affirmed.

Writ of error refused.

LEON J. YARNELL v. JOHN H. BURNETT.

Decided January 17, 1901.

Appeal—Writ of Error—Necessary Parties—Vendor's Lien Note Assumed.

A vendor's lien note for land was executed by D., and subsequently Y., having purchased the land, assumed its payment as part of the consideration. The holder of the note sued both D. and Y. and obtained judgment against D. for the amount of the note, and against both for foreclosure of the lien, from which judgment Y. alone appealed by writ of error against the plaintiff, and without making D. a party thereto. Held, that the writ of error must be dismissed, as D. was a necessary party thereto, his interest being adverse to that of Y., in that if the latter should defeat the lien, as he sought to do, D. must pay the entire money judgment.

Appeal from Harris. Tried below before Hon. Wm. H. Wilson.

F. F. and *E. T. Chew,* for appellant.

J. R. Burnett, for appellee.

GARRETT, CHIEF JUSTICE.—Burnett sued the defendant in error and one L. A. Dowdell to recover upon a promissory note executed by Dowdell for land, and to foreclose a vendor's lien. Dowdell had conveyed the land to Yarnell by a deed which recited as the consideration the assumption of the note by the latter. Judgment was sought against both defendants for the amount of the note, with foreclosure of a vendor's lien upon the land. Yarnell pleaded defenses against the validity of the lien and his liability for the note. Upon trial judgment was rendered against Dowdell for the amount of the note, and against both of them foreclosing the lien. Dowdell abides by the judgment. Yarnell made a motion for a new trial, which was overruled. He filed a statement of facts in due time, and has sought to bring the case before this court by writ of error for revision. To that end he filed with the clerk of the District Court a petition for writ of error in which he set out the judgment and asked for citation to J. H. Burnett only, and at the same time filed an affidavit in forma pauperis in lieu of bond, made before the county judge of Harris County. Citation was issued to J. H. Burnett alone, and he alone was served therewith. Dowdell was not made a party to the proceeding, and for that reason the defendant in error has moved to dismiss.

The motion to dismiss the writ of error must be sustained. Dowdell's interest in the judgment is adverse to that of the plaintiff in error, because if the latter defeats the lien on the land, he must pay the entire money judgment. Grant v. Collins, 5 Texas Civ. App., 45. The petition for a writ of error should state the names and residences of the parties adversely interested. Rev. Stats., art. 1391. And citation in error must issue to them. Art. 1393. Even if Dowdell had been included in the petition and citation had issued to him, the failure to have him served with citation would have been ground for dismissal. Thomas v. Thomas, 57 Texas, 516.

Dismissed.

Z. T. NESBIT v. ELLA GOODRICH ET AL.

Decided January 24, 1901.

1.—Usury—Contract for Taking Up and Holding Judgment.

Where a judgment debtor agreed to pay 10 per cent interest per annum on all the indebtedness, principal, interest and cost of taking up a judgment against him, and also executed his note for $300 as compensation for advancing money—the expenses and compensation of the loan agent covering but $60 of that amount—the note was usurious and void, except as to such $60.

2.—Same—Original Contract Not Tainted.

The judgment, not being itself tainted with usury, was not affected by the subsequent usurious and void contract under which it was purchased and carried for a year, and was therefore still enforcible for its full amount of principal, interest and costs.

Appeal from Anderson. Tried below before Hon. A. D. Lipscomb.

Campbell & McMeans and *W. A. H. Miller,* for appellant.

Gregg & Brooks, for appellees.

GARRETT, CHIEF JUSTICE.—Ella Goodrich, joined by her husband, brought this suit to enjoin the sale of a lot in the city of Palestine under a decree of foreclosure and to have the debt credited with certain amounts paid as interest on the ground of usury. The facts were substantially as follows. On May 15, 1897, W. C. Kendall, as receiver of the Palestine Loan Association, recovered a judgment against Tennie Hanna for the sum of $1138.05, with interest at the rate of 10 per cent per annum, besides costs of suit, and against the said Tennie Hanna and the appellee, Ella Goodrich, and her husband, M. A. Goodrich, foreclosing a lien for said amount on the south half of block 28, Larkin & Campbell's addition to the city of Palestine. The land was the separate property of the appellee, Ella Goodrich, subject to said lien. It was worth about $2500. An order of sale was issued upon said judgment, and the land was advertised to be sold on the first Tuesday in November, 1897. Appellees, who were in San Antonio, desired to borrow money to take up the judgment. This became known to W. A. H. Miller, who called to see Mrs. Goodrich and told her that he could secure a loan for her; that he was acting for the appellant, who was then in Missouri; but that he would have to go to Palestine to examine the property. They agreed that appellant should advance the money necessary to take up the judgment and interest and costs of suit, and the appellees would pay in twelve months, interest thereon at the rate of 10 per cent per annum, and in addition thereto execute a note to Miller for $300, payable in twelve months, with 10 per cent interest. This agreement was reduced to writing as follows:

"The State of Texas, Bexar County.

"Whereas W. A. H. Miller goes to Palestine at our request to have a

certain judgment which is a lien on 100 feet by 275 feet of ground on the corner of Sycamore and Dallas streets, in Palestine, transferred to Z. T. Nesbit, and said Nesbit is to carry said judgment until the 1st day of November, 1898, we hereby agree to pay 10 per cent interest per annum to said Nesbit on all moneys paid by said Nesbit in taking up said judgment, whether it be indebtedness, principal, interest, or cost. And we agree to pay all taxes due or to become due on said property, and to keep said property insured for the benefit of said Z. T. Nesbit. And should we fail to pay taxes and insurance, then Nesbit can pay same, and we promise to repay same with 10 per cent interest per annum before Nesbit is called upon to release or receipt his judgment lien. And whereas we, Ella L. Goodrich and M. A. Goodrich, have this day executed to W. A. H. Miller our promissory note for $300, we agree that same is a lien on property on which judgment here above mentioned is a lien, and is to be paid before said judgment, and we hereby agree that said Nesbit shall not release said judgment lien until said note is fully paid.

"Witness our hands, this the 26th day of October, 1897.

(Signed) "M. A. GOODRICH.
"ELLA GOODRICH."

Miller went to Palestine and took the money with him. He paid for the judgment, interest, and costs the sum of $1212.75. He took an assignment of the judgment from Kendall to Nesbit, and an agreement from the agent who had charge of renting the property to collect and remit the rents to Miller at San Antonio until the note was taken up. Miller indorsed the note to Nesbit within about one month after its execution. Payments were made and credited on the note amounting, as found by the jury, to $190.15.

At the end of the twelve months, the appellees having failed to pay the judgment, the appellant caused an order of sale to be issued, and the property was advertised for sale on the 3d day of January, 1899, for the satisfaction of said judgment and costs. The further execution of the writ was enjoined in this suit.

From the evidence before the jury they were authorized to find that Miller was the agent of appellant in making the loan to Mrs. Goodrich, and not a mere loanbroker; that not more than $60 of the amount paid was for the expenses and compensation of Miller in securing the loan; that the balance of the note for $300 was for the use of the money; and that appellant knew that the $300 note was exacted by Miller as a part of the transaction in which the loan was made, or that some such arrangement would be made, and ratified it. It was shown that Miller represented the appellant in making other loans, and that appellant knew that he exacted compensation from other borrowers. Mrs. Goodrich testified that Miller told her that he was acting for Nesbit. When Miller went to Palestine he took appellant's money with him, prepared to take up the judgment if he should find the security satisfactory. The

contract securing Nesbit also includes the $300 note. It was made a preferred lien, and it was immediately indorsed to Nesbit. We find that the contract was usurious. Williams v. Bryan, 68 Texas, 593; Stuart v. Saddlery Co., 21 Texas Civ. App., 530; Texas Loan Agency v. Hunter, 13 Texas Civ. App., 408.

By the judgment of the court the appellee was allowed a credit of $130.15 upon the principal of the loan, $1212.75, the jury having allowed $60 as compensation for Miller's services, and all interest was forfeited. It is insisted by the appellant that the foreclosure judgment was not tainted with usury, and that it should have borne interest from the date of its rendition, unaffected by the subsequent usurious contract. The rule as stated by Parsons is that, in order that a contract should be avoided as usurious, it is necessary that it should itself be tainted; for if any subsequent contract in payment of the first be usurious, this second contract will be void, and will therefore leave the original contract or debt wholly unpaid, and it may be enforced as if the second had not been made. 3 Pars. on Cont., 116. Such is the rule in this State. Krause v. Pope, 78 Texas, 478. By the contract for taking up and extending the judgment there was no new promise to pay the original amount thereof. Mrs. Goodrich was not personally bound therefor, but her property to a greater amount in value was subject thereto, and it was in effect her debt. So it remained in force, and was at her request assigned to Nesbit. It was untainted with usury, and was enforcible for the full amount, principal, interest, and costs. About this judgment contract a subsequent contract for the purchase and extension thereof was made which is held to be usurious. As such, and being only for interest, it is void in its entirety, except as to the sum included therein for the compensation of Miller in making the loan. Putting this subsequent contract aside as void, the judgment is not affected, but remains in force, bearing interest as provided therein; but the payments made upon the usurious contract and credited upon the note should be credited upon it. This court, approving the verdict of the jury in favor of the appellees that the contract is usurious, and the finding as to the amount paid thereon and the compensation that Miller was entitled to receive, will here reform the judgment of the court below so that the judgment of foreclosure shall continue to bear interest as therein provided, credited as of date November 1, 1898, by the amount as found by the jury.

Reformed and affirmed.

Writ of error refused.

MAXIMILIAN LUTHER ET AL. v. WESTERN UNION TELEGRAPH COMPANY.

Decided January 23, 1901.

1.—Motion for a New Trial—Postponement to Subsequent Term.

Under the statute requiring motions for new trial to be determined at the term at which they are filed, the district court is without authority to continue such a motion to a subsequent term, and its order in so doing is void, although the postponement is by the court of its own motion, and over the protest of the moving party. Rev. Stats., art. 1374.

2.—Same—Application to Equity Jurisdiction.

A motion for a new trial and application to the equity jurisdiction of the court, filed after the term of court at which judgment was rendered, is properly overruled where it sets up no defense except the incapacity of plaintiff to maintain the suit, which defense was asserted on the trial, considered and passed upon, and judgment rendered adverse to defendants, to which judgment they duly excepted and gave notice of appeal.

Appeal from Nueces. Tried below before Hon. James B. Wells.

McCampbells & Stayton, for appellants.

Norman G. Kittrell and *Geo. H. Fearons,* for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—We copy from appellants' brief the following statement of the nature and result of this suit:

"This suit was instituted on the 25th day of October, A. D. 1897, by appellee, against Maximilian Luther, David Hirsch, and Ed. A. Born, to recover on a bond of $1000, executed by them and payable to the Western Union Telegraph Company, conditioned that Maximilian Luther should well and faithfully perform the duties of manager of the company's telegraph office at Corpus Christi, Texas.

"The appellants answered by demurrer to the effect that appellee was a foreign corporation, organized and existing under the laws of the State of New York and doing business in Texas, and that it was not alleged in its petition that it had deposited its articles of incorporation with the Secretary of State of the State of Texas and secured a permit to do business in Texas as a foreign corporation, and that it was not alleged affirmatively that it was a corporation employed by the United States in the transaction of its business. This was also pleaded specially by way of answer to the merits, in addition to a general denial.

"Appellee, by supplemental petition filed on November 15, 1898, replied to the defense set up by appellants, and alleged that it had been and was prosecuting business in the State of Texas by virtue of an act of the United States Congress of July 24, 1866, long prior to the passage of the law by the State of Texas, requiring the taking out of permits. That it had established and carried on its business along lines of railway and postroads long before the passage of said act, and especially was this the case in Nueces County, Texas. That the gen-

eral government had long been using these lines for sending all classes of messages and as one of the instruments of its service, paying a compensation therefor, long prior to the passage of said law by the State of Texas, and was so doing at the time of the taking of said bond, and has ever since. That since its line was established in Texas, and since it began business in Nueces County, it had continually sent messages affecting interstate commence, and had been continuously engaged in interstate commerce. That it had been employed continuously in transacting the business of the general government under the terms of said act of Congress of July 24, 1866, which it had accepted on July 25, 1867, and had since said date operated under the terms of said act and as a servant of the United States government, etc.

"On the 15th day of November, 1898, judgment was entered, overruling appellants' general and special demurrers, and decreeing that the plaintiff recover of defendants the sum of $1009.15, together with 6 per cent interest from date, and costs. To this judgment appellants excepted and gave notice of appeal, and ten days were allowed after the adjournment of court within which to file a statement of facts. On December 14th the judgment, upon motion of appellants, was reformed so as to read for the sum of $967.68, etc. On the 16th day of December a motion for a new trial was filed by the appellants.

"On the 30th of December, the following order was made on the motion for a new trial: 'And now on this 30th day of December, 1898, came on to be considered the motion herein filed at a former day of this term for a new trial, and it appearing to the court that the matters and things in said motion set forth involve important legal issues and require further investigation of the law affecting same, by this court, and that further argument thereon by counsel for plaintiffs and defendants is necessary and desirable, it is now here ordered and adjudged that the said motion for a new trial be continued over for further hearing to the next term of this court, and without prejudice to the matters and things in said motion set forth, and that this cause stand continued until next term by operation of law.'

"At the April term of the District Court the following order was entered in said cause: 'Tuesday, May 16, 1899, continued by operation of law; court disqualified, having been of counsel.'

"At the next term of court the following order was entered: 'Continued to May term, 1900, Judge Lowe sitting in exchange.' At the January term, 1900, the cause was continued by the following order: 'Tuesday, January 2, 1900, continued by operation of law; court disqualified.' At the May term, 1900, the cause came up for hearing before Judge Lowe, sitting by exchange, upon the plaintiff's motion to dismiss defendant's motion for a new trial, and upon the application of the defendants for a new trial and rehearing under the equity jurisdiction of the court.

"On the 17th day of May, the following order was made and entered: 'On this 17th day of May, 1900, plaintiff's motion filed herein May 16,

1900, to dismiss defendant's motion for a new trial filed herein December 16, 1898, and also defendant's application for new trial and rehearing under the equity jurisprudence of the court, filed herein, on May 17, 1900, coming on to be heard by the court, said motion of plaintiff and application of the defendants were considered together, and the court having heard said motion and application read, and having heard argument on same, is of the opinion that the law is with the plaintiff on both said motion and application, and it is accordingly ordered, adjudged, and declared that the said motion of plaintiff be and the same is now in all things sustained, and that the said motion of defendants for a new trial filed herein on December 16, 1898, as aforesaid, be and the same is hereby stricken out and for naught held; and also that said application of defendants filed herein on May 17, 1900, as aforesaid, be and the same is in all things overruled and denied; and it is also ordered and decreed that said plaintiff, the Western Union Telegraph Company, do have and recover of and from the defendants, Maximilian Luther, E. A. Born, and D. Hirsch, or either of them, all costs in and about said motion and application expended or incurred; and for all such costs and the other costs thereof, if any, let execution issue; to all of which ruling and action of the court, defendants then and there in open court excepted and gave notice of appeal to the Court of Civil Appeals in and for the First Supreme Judicial District of Texas, holding its session at Galveston, Texas; and they are given ten days after the adjournment of this court within which to prepare and file herein a statement of facts.'

"The application of appellants for a new trial under the equity jurisprudence of the court was filed on the 17th day of May, 1900, and is as follows:

" 'Now come the defendants herein, David Hirsch and E. A. Born, and show to the court that a new trial should be granted herein, independent of the continued motion for a new trial pending in this court since the 16th day of December, 1898; and now, in the nature of a bill of equity, praying for a new trial, they respectively show to the court: (1) That it is true, as alleged, that on the 15th day of November, 1898, the plaintiff herein recovered a judgment against one Max Luther and against these defendants as sureties upon a certain bond, dated the 17th day of July, 1889, and given for the sum of one thousand dollars for the faithful accounting by said Luther for all moneys coming into his hands, belonging to said telegraph company; that these defendants then had, and now have, a good, complete, and perfect defense against the said cause of action and in this, to wit: That the said Western Union Telegraph Company was, and is, a private corporation, and alleged by it in bringing the action herein to be a private corporation, chartered, organized, and existing under the laws of the State of New York, and operating for pecuniary profit.

" 'That under the laws of this State, operative and in force in this

State at the time of the execution of the alleged bond, whereon defendants were sureties, July 11, 1889, it was provided by the laws of the State of Texas (operative July 5, 1889), "That hereafter any corporation for pecuniary profit (except as therein provided), organized or created under the laws of any other State, or of any Territory of the United States, or of any municipality, or of any foreign government, sovereignty or municipality, desiring to transact business in this State, or solicit business in this State, or establish a general or special or general office in this State, shall be and the same are hereby required to file with the Secretary of State a duly certified copy of its articles of incorporation, and thereupon the Secretary of State shall issue to said corporation a permit to transact business in this State." And it was in said law further provided "that thereafter no such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this State upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed, the corporation had filed its articles of incorporation under the provisions of this act, in the office of the Secretary of State, for the purpose of procuring its permit." And it was further provided that a certificate of the Secretary of State to the effect that the corporation named therein had failed to file in his office its articles of incorporation, shall be evidence that such corporation has in no particular complied with the requirements of said act.

"'Defendants aver that at the time of the execution of the alleged contract or bond by defendants as sureties, the said plaintiff, the Western Union Telegraph Company, was a private foreign corporation, as before alleged, and had not then, nor had it up to the 22d day of July, 1898, filed a certified copy of its articles of incorporation in the office of the Secretary of State of Texas, or in any manner attempted to comply with said law; and all of which is now shown by a certificate of J. W. Madden, Secretary of State of Texas, and made a part of this equitable appeal for a new trial to the court; and defendants show that the pleadings of said plaintiff nowhere attempted to allege that they had obtained a permit to do business in the State of Texas, or that they were exempted from obtaining said permit; and defendants allege that the said plaintiff corporation was not within any of the exceptions of said law requiring it to obtain such permit. And defendants aver and show that by their first amended original answer, filed in this cause on the 15th day of November, 1898, they presented their defense against the action of plaintiff, first by demurrer in words substantially as follows, to wit. "They demur to the fourth amended petition of plaintiff herein filed on the 15th day of November, 1898, and say same is insufficient in law and shows no cause of action against them, or either of them, and they especially demur to same and say same is defective and insufficient, because the same affirmatively shows that plaintiff is a foreign corporation, organized and existing under and by virtue of the laws of the State of New York, and is doing business in the State of

Texas, but it is nowhere alleged therein that at the time of the contract therein sued on, or at any time before or at any time since the said corporation had deposited its articles of incorporation with the Secretary of State of the State of Texas, and obtained thereby and therefrom a permit to do business in the State of Texas as a foreign corporation; and defendant further answered by a plea in bar in said first amended original answer, and which is in words and terms substantially as follows, to wit: 'And further answering herein, come the said defendants and say that at the time the contract alleged in plaintiff's petition was executed, and on which it sues herein, the said foreign corporation had not filed, as required by law, with the Secretary of State of this State, its articles of incorporation and obtained a permit to do business in the State of Texas, nor has said corporation, at any time since, filed its said articles of incorporation and obtained said permit; and of this defendants put themselves upon the country.'

"'And defendants say that they urged their said defenses, and same were good legal defenses, against the demand and action of said plaintiff, and at and upon the trial, November, 1898. That a trial was had in the District Court of Nueces County, and without a jury, a judgment was rendered against the defendant, and on the 15th day of November, 1898. That thereafter and during the same regular term of said court these defendants caused to be prepared their motion for a new trial, and urged therein the error of the trial court in overruling their said demurrer as above, and in rendering judgment for plaintiff when it was affirmatively shown that it was a foreign corporation, and had failed to ever file a certified copy of its charter with the Secretary of State of this State. And in this connection these defendants aver that the trial court had found in writing, as a conclusion of fact (numbered 5) as follows: "I find that the said Western Union Telegraph Company has never filed a certified copy of its charter or articles of incorporation in the office of the Secretary of State of this State."

"'Defendants show that they were prevented from urging their said defense and grounds for a new trial without fault on their part, and as follows: That the attorney for the plaintiff, the Western Union Telegraph Company, one John A. Green, Jr., was at the time of said trial a resident of the city of San Antonio, county of Bexar, and State of Texas, distant about 163 miles from Corpus Christi, the county seat of Nueces County, where this case was tried; that he was present at the trial of this cause, and on the day following entry of judgment, November 15, 1898, he was compelled to and did return to his home in San Antonio; that he was there taken sick, his last and mortal illness, and was unable to return, though duly notified, to argue or submit the said motion for a new trial; that the honorable court, after inspection of said motion, declared that he desired argument and authorities on the points raised by defendants, and continued the hearing and disposition of said motion from day to day during said term in the hope that said attorney for plaintiff would be able to return; that said attorney was unable from

his physical condition to return, and the court, against the earnest solicitations of defendant to dispose of said motion, declined so to do, other than to take the same under advisement to be passed upon by him at the next term of court without prejudice to the rights of either party. That this action of said court was taken of its motion and over the protest and against the solicitations of these defendants, as will be seen from Exhibit B, hereto attached and made a part hereof. Defendants further show that following the said regular term at which the said motion was continued, Stanley Welch, who had in this cause been the active counsel for the defendants, in January, 1899, qualified as district judge of the Twenty-eight Judicial District, wherein this cause was pending, and he has ever since been its judge and disqualified from trying said cause, and whereby the said motion could not be heard until this term, when exchange of districts temporarily has been made by Stanley Welch with the Hon. M. F. Lowe, judge of the Thirty-sixth District, and now presiding herein. Defendants aver that the Hon. James B. Wells was district judge at the trial of said cause and the continuing of said motion upon his motion as aforesaid, and is present at the hearing hereof to verify the facts as to the defenses of said defendant and his declining to act upon the said motion for a new trial other than by postponement as herein alleged.

"'And defendants say, that in the manner and form as herein set out, they have and have always had a good, legal, and valid defense against the claim and demand of plaintiff; they were prevented from further urging the same, and having their motion for a new trial heard, by the mortal illness and death of the attorney for plaintiff (operating with other reasons, that of desiring a full argument and submission of authorities on the part of the presiding judge), to continue said hearing. Defendants say that if it be true, as now inequitably demanded by plaintiff, that the court has no jurisdiction to hear a motion for a new trial filed in 1898, it has equitable jurisdiction, independent of same, to consider the facts now herein set forth (and in its equitable powers), because the defendants have a good defense, which they have diligently prosecuted, and which they have been prevented from prosecuting and asserting by no fault of theirs, and in the exercise of equitable jurisdiction should grant a new trial herein, as prayed for.'"

Appellants, having brought the case to this court on appeal, insist that the judgment of the court below should be reversed, first, because in its judgment rendered on the 17th of May, 1900, the court erred in striking out their motion for a new trial filed on December 16, 1898; and second, because the court erred in refusing appellants' application for a new trial filed on May 17, 1900. Article 1374 of the Revised Statutes provides that all motions for a new trial, in arrest of judgment or to set aside a judgment, shall be determined at the term of the court at which such motion shall be made; and article 1373 requires such motion to be made within two days after the rendition of the ver-

dict, if the term of court shall continue so long; if not, then before the end of the term.

In the case of McKean v. Zilker, 9 Texas, 58, the Supreme Court, in construing a similar provision in the old statute, says: "It is insisted that the statute is but directory, and that it was within the power of the court to postpone to the next term, and then act upon the motion for a new trial. We can not so regard it. We think the mandate of the law is peremptory and must be obeyed, and that at the end of the term the motion, not having been acted on, was discharged by operation of law. * * * The judge had no authority to continue the motion. The order for that purpose and that made dependent upon it were void." The rule announced in this case has been uniformly followed by our Supreme Court. Overton v. Blum, 50 Texas, 423; Eddleman v. McGlathery, 74 Texas, 280.

Appellants recognize this to be the rule, but contended that it should not apply in a case of this kind, where the facts show that the motion for a new trial was postponed to the next term of the court over the earnest protest of appellants, but should only be applied where the failure of the court to pass upon the motion at the term at which the same was filed occasioned by some act or omission of the moving party. This contention can not be sustained, because under the construction given the statute in the case of McKean v. Zilker, supra, the court is without authority to continue a motion for a new trial to a subsequent term of the court, and an order to that effect is void. The nullity of such proceeding is not made to depend upon the circumstances under which the order of postponement is made, but because of the lack of power in the court to make the order under any circumstances. The consent of both parties could not render the proceedings valid, and certainly the protest and objection of the moving party could not have that effect.

Under their second assignment of error appellants contend that the trial court should have granted their application for a new trial, filed on the 17th day of May, 1900, under the equitable jurisdiction of the court, because said application shows that they have a just and legal defense to plaintiff's action, which they have, without fault on their part, been deprived of asserting. We think the trial court did not err in the matter complained of in this assignment. The application for a new trial set up no defense except the incapacity of plaintiff to maintain this suit, which defense was asserted on the trial of this cause on the 15th of November, 1898, considered and passed upon by the court, and judgment rendered adverse to appellants, to which judgment they duly excepted and gave notice of appeal. The trial of the cause having been by the judge without the intervention of a jury, a motion for a new trial was not necessary to perfect appellants' right of appeal, and when the court adjourned without passing upon the motion, in the language of Judge Wheeler, in the case of McKean v. Zilker, supra, said motion "was discharged by operation of law," and appellants, having given the necessary notice of appeal, could have perfected said appeal

and had the judgment of the court below reviewed and its ruling in not sustaining their defense reversed, if such ruling had been found to be erroneous. Bell v. Alexander, 22 Texas, 351. Having failed to avail themselves of this right of appeal, they can not complain of the refusal of the district judge to review a former judgment of that court rendered nearly two years previous and set aside said judgment because of a supposed error of law committed by the court in rendering it.

In the case of Overton v. Blum, supra, Judge Moore, speaking for the court, says: "But though a new trial is never granted in terms after the adjournment of the court rendering the judgment, and there can be no such thing as another trial of the case at law after it has once been decided, it is not to be questioned that when a judgment has been obtained by fraud, mistake, or accident, and without any want of proper diligence on the part of the party against whom it is rendered, the district court, in the exercise of its equitable powers, may grant relief by re-examining the case on its merits and granting such relief as equity and justice may demand and require. To call, however, for the interposition of a court of equity, and to warrant the staying of the enforcement of a judgment rendered by a court having jurisdiction of the parties and the subject matter of the suit, it is not sufficient that a mistake or accident may have occurred in the course of the proceeding, but it must also be shown that there is merit in the applicant's case, and but for the interposition of the court he must sustain irreparable injury to which he has in no material manner contributed."

We think the application for a new trial in this case contains none of the requisites prescribed by Judge Moore as necessary to call into action the equity power of the court. When tested by the rule above quoted, which is approved and followed in the cases of Johnson v. Templeton, 60 Texas, 238; Harris v. Musgrove, 72 Texas, 18, and Merrell v. Roberts, 78 Texas, 28, we think the application was without merit and was properly overruled.

There being no error in the judgment of the court below it will be affirmed, and it is so ordered.

Affirmed.

Application for writ of error dismissed by Supreme Court for want of jurisdiction.

GEO. M. DILLEY & SON v. FREEDMAN & BRO.

Decided January 24, 1901.

Promissory Notes—Assignment and Payment—Joint Security—Subrogation.

D. & Son, owners of a series of notes secured by a mortgage, parted with their title to the first four of the notes, before maturity, and the owners sent them to a bank for collection. The makers of the notes arranged with plaintiffs to take them up as they fell due, upon an understanding that the notes were to be kept alive, and that plaintiff would be entitled to the same security that D. & Son had, and the notes, upon payment of the amount due thereon, were assigned to plaintiffs by the bank. Held, that the notes had not been paid, but had been purchased, by plaintiffs, and the rule that, in order to become subrogated to the lien of the mortgage, plaintiffs would have to pay off the whole series of notes, did not apply, and that a judgment foreclosing the mortgage and directing the proceeds to be paid pro rata on the entire series of notes was correct.

Appeal from Cherokee. Tried below before Hon. Tom C. Davis.

Campbell & McMeans, for appellants.

McClure & Whitman and *Wilson & Watkins,* for appellees.

GARRETT, CHIEF JUSTICE.—Freedman & Bro. brought this suit in the District Court of Cherokee County against Harrison & Jowell for recovery upon four promissory notes of the aggregate sum of $582, and an account for $499.90, and the foreclosure of a mortgage on certain machinery and other personal property. The plaintiffs alleged that the notes belonged to a series of fourteen notes executed by the defendants Harrison & Jowell to Geo. M. Dilley & Son for machinery sold to them by the latter, and to secure which Harrison & Jowell had executed a prior mortgage to Geo. M. Dilley & Son upon the same machinery; and that plaintiffs were the owners and holders of the first four of said notes which had been indorsed in blank by the said Geo. M. Dilley & Son. Plaintiffs made the said Geo. M. Dilley & Son parties to the suit, and prayed for judgment against Harrison & Jowell for their debt and foreclosure of their mortgage, and that the property be sold and the proceeds applied first equally to the payment of said fourteen notes, the balance, if any, to their said account. Defendants Geo. M. Dilley & Son in their answer denied that plaintiffs had become the owners and holders of said four notes in due course of trade, but had paid the same for said Harrison & Jowell at their request, and were not entitled to an equal right with said Geo. M. Dilley & Son to said security. They also asked for a foreclosure of their lien for the ten notes remaining in their hands unpaid. The trial was by the court without a jury and resulted in a judgment in favor of the plaintiffs against Harrison & Jowell for the amount of said four notes and their account, with foreclosure of the lien of both mortgages. The court ascertained and adjudged in favor of

Geo. M. Dilley & Son against Harrison & Jowell the amount due on the ten notes held by them, and ordered the sale of the property and the proceeds thereof paid pro rata to the satisfaction of the amounts adjudged due on said notes to the plaintiffs and to Geo. M. Dilley & Son respectively, etc. Harrison & Jowell have not appealed.

The notes in suit were executed November 15, 1898, and were as described in the pleadings of the parties, and the two mortgages were both executed as alleged. The property is fully described in the judgment of the court. Before their first note became due Harrison & Jowell informed the plaintiffs that they had executed the fourteen notes to Geo. M. Dilley & Son, secured by mortgage on their mill machinery upon which they had already given the plaintiffs a mortgage subject to that of Geo. M. Dilley & Son, and requested plaintiffs to pay off the notes as they matured and carry them for them. Plaintiffs agreed to do so, with the understanding between them and Harrison & Jowell that they would be entitled to the same security as Geo. M. Dilley & Son had. Both parties requested the bank at Rusk, to which the notes would be sent for collection, to notify plaintiffs. The four notes sued on by plaintiffs were the first to mature and as they became due they were sent to the bank by the owners thereof for collection. Plaintiffs were notified when each of the four notes was received, and upon payment of the amount due upon each note it was assigned to them by the bank, acting by its cashier. The bank held the notes for collection only, and plaintiffs knew this fact. Before the maturity of said four notes the defendants Geo. M. Dilley & Son transferred and assigned each of them respectively to purchasers thereof by indorsing each of them in blank with their firm name, and parted with the title thereto.

If the appellants had not transferred the notes and parted with their title to them and had sent them to the bank at Rusk for collection for their account, the rule invoked by them, that in order to become subrogated to the lien of their mortgage the plaintiff would be obliged to pay off the whole series of notes, would hold good. Cason v. Conner, 83 Texas, 26; Fievel v. Zuber, 67 Texas, 280; 24 Am. and Eng. Enc. of Law, 200. But having assigned the notes and parted with all title to them, the doctrine of subrogation does not apply. The rule seems to be finally settled in this State that where the holder of a series of notes secured by a lien assigns one or more of them and retains the others, precedence is given to the assigned notes in the security reserved for their payment. Douglas v. Blount, 22 Texas Civ. App., 493. The rule obtaining before the case of Whitehead v. Fisher, 64 Texas, 638, upon the authority of which Douglas v. Blount was decided, was for equality of payment. Salmon v. Downs, 55 Texas, 243; Wooters v. Hollingsworth, 58 Texas, 371. See paper of Mr. R. L. Batts, Proceedings Texas Bar Association 1900, page 125.

When the appellants transferred the notes they assigned with them the right to the security and the plaintiffs acquired the same by the assign-

ment to them. If the notes had been paid, the right to the security held by them would have been extinguished, but they were not paid. Plaintiffs took the notes up for the makers with the understanding that they were to be kept on foot, and they were transferred to them by the bank. They were still negotiable, although past due. The bank may have been without authority to transfer them, but that raises only a question of title between the holders who sent them to the bank for collection and the plaintiffs. Having parted with their title and lien, the appellants can have no interest in this question. Since their assignees acquiesce, the appellants can not complain. The judgment of the court below is without error of which appellants can complain, and will be affirmed.

Affirmed.

ON MOTION FOR REHEARING.

Since the filing of our conclusions in this case our attention has been called to the fact that the Supreme Court did not refuse a writ of error in the case of Douglas v. Blount, 22 Texas Civil Appeals, 493, but that the application for writ of error was dismissed. See Douglas v. Blount, 93 Texas, 499, for the opinion of the Supreme Court on dismissing the application. We accepted the statement made in the paper of Mr. Batts as to the disposition of the case. The expression in the opinion in this case, that the rule seems to be finally settled, must be corrected, for Salmon v. Downs and Wooters v. Hollingsworth, in the absence of the approval by the Supreme Court of Douglass v. Blount, as decided by the Court of Civil Appeals at San Antonio, and in view of the fact that the case of Whitehead v. Fisher is dictum, only, must still be considered unaffected as authority. But this does not affect our decision. The motion for a rehearing is overruled.

Overruled.

T. R. ELLISON & CO. v. YATES & SMITH.

Decided January 31, 1901.

Res Judicata—Jurisdiction Over Person—Judgment of Dismissal—Plea of Privilege.

Where defendants filed a plea to the jurisdiction over their persons, which plea was sustained and the suit dismissed, and in a second suit on the same subject matter brought against them by plaintiffs, defendants again filed a plea of personal privilege, and also a plea setting up such former judgment of dismissal in bar of plaintiffs' right to sue again in that county, it was error for the court to hold such judgment to be res judicata upon the question of jurisdiction raised by the plea of personal privilege in the second suit.

Appeal from the County Court of Galveston County. Tried below before Hon. Morgan M. Mann.

Lovejoy, Sampson, Malevinsky & Houk, for appellants.

Young & Stinchcomb and *Marsene Johnson,* for appellees.

PLEASANTS, ASSOCIATE JUSTICE.—This was a suit to recover damages for a breach of certain contracts for the sale of cotton, the claims for damages arising out of said breach having, as alleged in the petition, been assigned to appellants. The petition alleges that the appellees, who reside in Gregg County, Texas, agreed and contracted in writing to pay said damages in Galveston County. The appellees filed a plea of personal privilege to be sued in the county of their residence, and also a plea of res adjudicata in which they claim that the trial court had no jurisdiction over their persons, because they say that in a former suit between the same parties and involving the identical cause of action set up by plaintiffs in this suit, appellees filed a plea to the jurisdiction of the court over their persons, which plea was sustained and said suit dismissed, which judgment of dismissal was never set aside or appealed from, but is still a final and subsisting judgment, and is now pleaded as res adjudicata, and in bar of plaintiffs' right to bring this suit in Galveston County.

Upon the trial of the cause in the court below, judgment was rendered sustaining appellees' plea of res adjudicata, and dismissing the cause, from which judgment appellants prosecute this appeal.

It is not necessary, under our view of the law, to determine whether or not the cause of action asserted in this case is identical with the cause of action asserted in the former suit between the parties to this suit which was dismissed for want of jurisdiction of the persons of the defendants. Admitting that the two suits are identical as to parties and subject matter, we are of opinion that the judgment sustaining the plea to the jurisdiction in the first suit would not be res adjudicata upon the question of jurisdiction raised by the plea of personal privilege in this suit. Plaintiff's right to have their cause of action tried in Galveston County was not finally determined by the judgment of dismissal in the first suit. Under the facts as they then existed, or as they were pleaded and proven, the court held that plaintiffs did not show themselves entitled to maintain the suit in said county against defendant's plea of privilege to be sued in the county of their residence. To hold that such judgment of dismissal would forever bar plaintiffs from bringing their suit in said county might, under some circumstances, amount to a denial of the right to have their cause litigated.

Let us suppose that, after said judgment of dismissal and before plaintiffs could bring a new suit in Gregg County, the defendants had moved to Galveston County. In such event their plea to the jurisdiction would have been good to a suit against them in Gregg County, and under the contention of appellees in this case a plea of res adjudicata would be a perfect defense to a second suit against them in Galveston County. No rule which could work such manifest injustice can be sound.

When defendants' plea of personal privilege was sustained in the first suit, plaintiffs could have amended their petition and set up additional facts (if such facts existed) which would have shown them entitled to maintain their suit in Galveston County; and there can be no sound reason for denying them the right to set up such additional facts in a second suit if they prefer to bring a second suit rather than amend their petition in the original suit. The right to be sued in the county of one's residence can only be asserted by a plea of personal privilege, and unless such plea is sustained, it is error to dismiss a suit because of the want of jurisdiction over the person of the defendant. The issue as to the want of such jurisdiction can not be raised by a plea of res adjudicata setting up that in a former suit between the same parties and involving the same subject matter a judgment was rendered sustaining the defendants' plea of personal privilege. The court below erred in sustaining the plea of res adjudicata in this case, and its judgment will be reversed and this cause remanded for a new trial.

Reversed and remanded.

SECOND DISTRICT, 1901.

WESTERN UNION TELEGRAPH COMPANY v. J. W. NORRIS.

Decided January 5, 1901.

1.—Harmless Error—Amendment—Negligence.

It was harmless error for the court to overrule exceptions that asserted limitations against an amendment alleging an act not before pleaded, where the case was so submitted as to permit recovery only on the negligence averred in the original petition.

2.—Limitations—Delay in Taking Out Mandate.

That six years elapsed after the reversal of a case by the appellate court before plaintiff took out the mandate and filed an amendment below, did not necessarily bar his right to further prosecute the case, there being no statute limiting the time within which the mandate must be taken out, and, in this case, no issue made as to abandonment of the suit.

3.—Telegraph Company—Evidence Held Competent.

In an action for the nondelivery of a telegram announcing that plaintiff's son was dying, it was competent for plaintiff to testify that had it been delivered he would have understood it correctly, although the son's first name was wrongly given therein, and that he would have gone to the son, and would have wired back for the body to be held awaiting his arrival, and to show by another that the body would have been so held.

4.—Same—Unrepeated Message—Prima Facie Case of Negligence.

In an unrepeated message the name of the addressee was changed in transmission from "Norris" to "Nortys." The contract by virtue of which it was sent provided that the defendant company should not be responsible for any errors in its transmission. No evidence was offered at the trial showing how or why the mistake of name occurred in the transmission, and defendant requested a charge, in effect, that by virtue of such contract it was not liable for the error.

Held, that the charge was properly refused, since the company, as a common carrier of messages, could not contract against exemption from liability for its own negligence, and such change of name of the addressee presented a prima facie case of negligence.

Appeal from Clay. Tried below before Hon. A. H. Carrigan.

Stanley, Spoonts & Thompson, for appellant.

J. A. Templeton, for appellee.

HUNTER, ASSOCIATE JUSTICE.—This suit was filed in the District Court of Clay County by J. W. Norris, the appellee, on March 9, 1891, to recover from appellant damages for alleged negligence in the transmission of a message, and in the failure to deliver the same. Said message as delivered to the appellant's operator at Paris, was as follows:

"Paris, Texas, November 16, 1890.—To J. W. Norris and wife, Henrietta, Texas: Come on first train. John Norris, is dying. Jim Chancellor, Deputy Marshal."

This message was delivered to appellant at Paris between 8 and 9 o'clock a. m. of the day of its date. J. W. Norris and wife were the father and mother of Robert Norris, who was confined in the hospital department of the county jail at Paris, in the custody of the United States marshal, for some offense against the laws of the United States, and his father and mother knew that he was there so confined in the custody of the United States marshal. The receiving agent or operator at Henrietta took the message from the wire as addressed to "J. W. Nortys and wife." The message was not a repeated message, but the company neither pleaded or proved any excuse or reason for the mistake. It simply relied upon a condition printed upon the message blank, that it would not be responsible for such errors unless the message was repeated. It appears that, the operator and messenger both having tried diligently to find J. W. Nortys, and having failed, a service message was sent back to Paris at 4 o'clock of that day, notifying Chancellor that J. W. Norris could not be found in Henrietta. The addressee, Norris, resided within 300 or 400 yards of the appellant's office in Henrietta, and had for several years, and was well known, though a day laborer, and was at home all day that day, it being Sunday. This service message, it seems, was delivered to Chancellor at about 4 o'clock in the afternoon of that day, and he paid 40 cents for it, as he did also for the message he sent. This service message is not copied in the record, and we are unable to give its contents literally, but the witness Jim Chancellor speaks of it as follows: "I paid 40 cents for a return message notifying me that J. W. Norris and wife, the persons to whom I had sent the message, could not be found in Henrietta, and that the message was undelivered." Robert Norris died about 1 o'clock p. m. that day, and was buried about 5 o'clock p. m. of the same day. The body could have been held out for forty-eight hours, and the marshal would have done so if the father and

mother had sent him a message requesting it. The mistake of calling the person John, instead of Robert, was made by Chancellor. He had known him as John, and always called him John. He noticed the mistake in his name after he had written it, but says he did not have time to change it. He told the agent at Paris that he expected an answer, and to send it to him at the jail. The prisoner was about twenty years old, and realizing his dying condition, requested Mr. Chancellor to let his parents know of it. If the message had been delivered to his father he would have known it was meant for him, and that it referred to his son Robert, and would have wired the marshal to hold the body, if dead, until he arrived, and he and his wife would have gone on railroad train Monday morning at 6:30, and would have arrived in Paris on that day about from 4 to 7 o'clock p. m., and he would have brought his son's body to Henrietta for burial. He learned of the death of his son from the Dallas News on November 19th, and also received a letter from Paris that his son was dead. He then went to the telegraph office at Henrietta and inquired if any telegram had been sent him, and the agent then gave him the "Nortys" message. The mental suffering of the father and mother at being deprived of seeing the body of their son before his burial, and of performing the last rites and duties to their deceased offspring, were sufficient to warrant the verdict of $1000. The only evidence of negligence on the part of appellant's agents in the transmission of the message was the error made in the spelling of the addressee's nam—Nortys for Norris.

This case was heard before this court on appeal by the telegraph company, and was reversed on the 28th day of March, 1894, but the opinion was not reported. No mandate from this court was asked for or issued until the 24th day of February, 1900, when, upon the application of Norris, it was issued, and was filed in the District Court of Clay County on the 26th day of February, 1900, and on the 4th day of March, 1900, the plaintiff below filed an amended petition, setting up as an additional act of negligence the notice given Chancellor by the service message that the original message had not been delivered because addressees could not be found, whereby said Chancellor immediately buried the body of Robert Norris, when, if such service message had not been delivered, he would have held the body until he received an answer to his original message. Defendant excepted to this amended pleading upon the ground that it alleged a new cause of action, and was barred by the statutes of limitations of one, two, and four years, which exceptions were overruled, and this action of the court is assigned as error. In both pleadings the injury is alleged to have been produced by negligence in failing to correctly transmit and deliver the message, and this was the only issue submitted to the jury as a ground of recovery, hence the error, if any, was harmless. See Railway v. Johnson, 34 S. W. Rep., 186, and authorities there cited.

The six years intervening between the reversal of the judgment by this court and the taking out of the mandate and filing the amended

pleading did not necessarily bar the plaintiff's right to prosecute his case, as there is no statute in this State limiting the time within which the mandate in such cases must be applied for or issued, and no issue of abandonment of the suit was made.

On the trial the plaintiff was permitted to prove, over the objection of the defendant, that the evidence was immaterial and irrelevant; that if the message had been delivered to him, he would have known it was meant for him and that it related to his son Robert; that he would have wired back to Chancellor to hold the body, and would have taken the morning train, November 17, for Paris. And was permitted to prove by Chancellor, over same objections, that the body could have been kept forty-eight hours longer, and that if he had received a message from plaintiff requesting it, he would have held the body until plaintiff's arrival.

We think this evidence was all competent, material, and relevant, and related to things which very naturally would have occurred, and must be held to have been within the contemplation of the parties interested in emergencies of that kind. Jones v. Roach, 21 Tex. Civ. App., 301; Telegraph Co. v. Mitchell, 91 Texas, 454. At common law, before parties to the suit were permitted to testify, the jury could have inferred that the father would have so acted from the relationship of the parties, but now he may state affirmatively what could then only be inferred.

The court in effect instructed the jury that if they believed from the evidence that the agents of the company were negligent in the transmission of the message, or in failing to deliver it; and that the injury was caused thereby, to find for the plaintiff. The defendant company requested the following charge, which was refused: "The contract by virtue of which said message was sent provides that the defendant would not be responsible for any errors in the transmission of said message, it being an unrepeated message, and if you find that the failure to deliver said message was caused by any error made in said message during transmission of the same, by changing the name from Norris to Nortys, then you are charged that plaintiff can not recover."

Appellant insists that, as this was an unrepeated message, it is not liable for any injury or damages "caused by the negligence of its servants or otherwise," under the printed form of contract signed by the sender, which contained the above stipulation.

We think the evidence is sufficient to establish negligence on the part of appellant's agents in failing to correctly transmit the mesage as delivered to the agent at Paris. The simple fact that the name of the addressee was changed in the transmission from Norris to "Nortys" made a prima facie case of negligence against the company, and this fact put the burden on it to prove that the error was not due to negligence, the means of doing this being peculiarly within its knowledge and power. Telegraph Co. v. Edsall, 63 Texas, 675; 2 Thomp. on Neg., 837, citing Telegraph Co. v. Carew, 15 Mich., 525; Rittenhouse v. Telegraph Co., 44 N. Y., 263; Tyler v. Telegraph Co., 60 Ill., 440; Baldwin v. Telegraph

Co., 45 N. Y., 751; Bartlett v. Telegraph Co., 62 Me., 209. To these authorities we add: 3 Suth. on Dam., 2 ed., sec. 957, and authorities cited in note 1 on page 2140; Pearsall v. Telegraph Co., 124 N. Y., 256; Telegraph Co. v. DuBois, 128 Ill., 248; Telegraph Co. v. Chamblee (Ala.), 25 So. Rep., 234; Telegraph Co. v. Odom, 21 Texas Civ. App., 537.

In this case, however, no cause or excuse for the error was alleged in appellant's answer. It simply pleaded the stipulation printed on the message to the effect that it was an unrepeated message, and that it was not, therefore, liable in damages for the error. The charge asked was framed upon the theory that the contract relieved the company of liability, even though its agents were negligent in transmitting the message. This is not true. The appellant is a common carrier of messages, and while it does not insure accuracy in the transmission thereof, except by special contract, it must be held to the use of ordinary care and diligence in the performance of its contract like every other common carrier. It holds itself out to the public as a common carrier of messages for hire, and when it accepts a message and receives pay for transmitting it, it is bound in law to do it, or be able to show some valid excuse for not doing it. If atmospheric conditions, or other unavoidable causes, supervene to prevent, these may be pleaded and proved to avoid liability; but there is no more reason for this company to be exempt from liability for the negligence of its agents in performing any part of its duties or contracts than there is for excusing any other common carrier. And to permit it to contract against liability for the negligence of its agents and servants is to concede special privileges to which it is not entitled. The special charge was therefore properly refused, as the stipulation contained in the contract against liability for negligence was unreasonable and void, and the charge as asked would have compelled the jury to find for defendant, though they may have believed that the error in the transmision was the result of negligence on the part of appellant's agents. We understand this to be in accordance with the rule as established in this State. Telegraph Co. v. Mill, 57 Texas, 283; Womack v. Telegraph Co., 58 Texas, 176; Telegraph Co. v. Odom, 21 Texas Civ. App., 537; Telegraph Co. v. Neill, 57 Texas, 289.

All the assignments of error are overruled, and no other, in our opinion, raises any new question which demands discussion.

This judgment is affirmed.

Affirmed.

Writ of error refused.

J. H. CAGE v. HEIRS OF JOHN C. TUCKER.

Decided January 5, 1901.

1.—Practice on Appeal—Assignment of Error—Brief—Proposition.

The propositions, or assignments of error submitted as propositions, in an appellant's brief, should each present a single idea, a distinct ground for reversal, and be supported by a statement giving not argumentative deductions, but copies of the charge complained of or other matter in the record, or at least its substance. See propositions and statements held insufficient.

2.—Community Property—Sale by Survivor—Necessity.

Where community debts existed, the survivor, being clothed with a general power to sell for their payment, must determine the necessity for sale, and the title of a purchaser, in the absence of fraud, can not be made to depend on the actual existence of such necessity.

3.—Same—Fraud—Evidence.

Proof that no actual necessity for the sale existed is admissible, in such cases, only on the issue as to whether the sale was fraudulent and collusive.

4.—Community Debts—Good Faith.

A charge should not require proof that the community debts authorizing sale by the survivor were bona fide, where no issue was made as to their validity.

5.—Community—Purchaser from Survivor—Adequate Consideration.

The purchaser of community property from the survivor selling to discharge community debts need not show that he paid a "fairly adequate" consideration, to sustain his title.

Appeal from Comanche. Trial below before Hon. N. R. Lindsey.

Lee Young and *A. P. Young,* for appellant.

G. H. Goodson, for appellee.

CONNER, CHIEF JUSTICE.—For the second time this case is before this court on appeal. This suit is one in trespass to try title instituted by appellees as the heirs of John C. Tucker, deceased, to recover of appellant an undivided one-half of the lands described in the petition, claiming title by descent from their deceased father, John C. Tucker. Appellant claimed by virtue of a conveyance from Mrs. P. J. Tucker, the mother of appellees and surviving wife of said John C. Tucker, alleged to have been made for the purpose of paying community debts of the said John C. and P. J. Tucker. Appellees denied that such was the purpose of the sale to appellant, and alleged fraud. A more complete statement of the nature and details of the suit may be found in the report of the case made on the former appeal. See Cage v. Tucker's Heirs, 14 Texas Civ. App., 316.

On this appeal we are confronted with the preliminary question as to the sufficiency of the assignments of error urged by appellant. They are eighteen or nineteen in number, and were apparently intended to present several interesting questions for our consideration; but appellees urge objections thereto on the ground of a want of conformity with the

rules prescribed by the Supreme Court for the preparation of a cause for submission. We are of opinion that such objections are well taken and must be sustained as against every assignment save the sixth; and we do not feel very clear that it should be considered, although we have finally concluded to do so, as hereinafter more fully stated. Rules 24 to 26 of the rules of the Courts of Civil Appeals provide that an assignment must distinctly specify the ground of error relied on, and in a particular manner point out that part of the proceedings contained in the record in which consists the error complained of, so as to identify it, and assignments not prepared as therein required will be considered as waived the same as if no assignments of error had been filed. Rules 29 to 32 inclusive require assignments of error to be copied in the brief and accompanied with appropriate propositions and statements, and when not so done the assignment shall be regarded as abandoned.

As illustrating the force of appellee's objections, we will give from appellant's brief his presentation of the second, eighth, and nineteenth asignments, to wit:

"The second and eighth asignments are presented as propositions together:

"Second Assignment.—The court erred in giving the special instructions requested by the plaintiffs, because the effect of such special instruction was to require the defendant J. H. Cage to see to the application of the proceeds of community property, and the law does not require a purchaser to see to the application of the proceeds of a sale. See charges, pages 105, 106.

"Eighth Assignment.—The court erred in refusing to give the special instruction requested by appellant, number 2, for the reason that the unquestioned evidence showed the land to be the homestead of John C. and P. J. Tucker at the time of John C. Tucker's death.

"The nineteenth assignment is presented as a proposition.

"Because every error assigned herein (in the assignment of errors) was assigned in the motion for a new trial, and the court erred in refusing a new trial."

The statements following these assignments are made to apply generally to the propositions involved, and consist, as we conceive, largely in argumentative deduction from the evidence.

Comment would seem to be unnecessary. We think it evident that the nineteenth assignment contains no distinct specification of error, and that the second and eighth contain entirely distinct and different propositions. Assignments when grouped should be followed by a distinct proposition or propositions severally presenting a single idea, followed by a quotation of the charge, or paragraph of the charge, the bill of exception, evidence, or fact relied upon, or at least the substance thereof, pointing out the particular place where to be found.

While perhaps not necessary to the decision, our Supreme Court in the case of Cooper v. Hiner, 91 Texas, 658, used language indicating that a

nonobservance of rule 29 made it mandatory upon us to disregard assignments of error in nonconformity therewith. But whether so or not, with the exception stated, we decline to consider appellant's assignments of error for manifest noncompliance with the rules. The rules referred to have in view the simplification of the many intricate questions constantly presented to the appellate courts and the saving of much valuable time and great labor, and we would endeavor to impress upon counsel engaged in the preparation of causes for submission on appeal the necessity of a careful observance of the rules prescribed therefor. In further illustration of what we have said on the subject see the following authorities: Texas Land Co. v. Williams, 48 Texas, 613; McManus v. Wallace, 52 Texas, 541; Live Stock Co. v. Chamberlain, 70 Texas, 138; McCrary v. Robinson, 57 S. W. Rep., 682; Railway v. True, 57 S. W. Rep., 977; Railway v. Smith, 57 S. W. Rep., 999; Shanks v. Carroll, 50 Texas, 19, 20; Battle v. John, 49 Texas, 289.

Appellees' objection to the consideration of the sixth assignment goes alone to the statement thereunder. While the statement does not comply strictly with rule 31, it does give the page of the transcript containing the objectionable charge, together with some of the appropriate facts necessary to be considered therewith, and we have accordingly decided, as stated, to consider the assignment; especially in view of the inclination of at least a part of the court to consider the question as error "apparent on the face of the record." See Rev. Stats., art. 1014; Rule 23, supra; Clements v. Clements, 46 S. W. Rep., 61.

The sixth assignment of error, which is submitted as a proposition, is as follows:

"The court erred in submitting the question as to whether a necessity for sale did exist in order to warrant the sale, because the law does not require that a purchaser under a survivor should show that a necessity for a sale did exist, nor does the law require the purchaser to prove any other fact than the existence of community debts in an amount which would create the appearance of a necessity for a sale. The rule adopted by the court makes the purchaser from a survivor a trustee, and charges him with the duties of a trustee, and the purchaser would then become responsible for the proper exercise of the discretion which the law vests in the survivor."

The charge of the court, here in effect complained of, is as follows:

"Therefore, if you believe from the evidence that at the time of the death of John C. Tucker there existed community debts against John C. and P. J. Tucker, incurred in good faith, as above explained, and you further believe it was necessary to sell any of the community property belonging to John C. and P. J. Tucker to pay such debts, and you further believe from the evidence that Mrs. P. J. Tucker in good faith sold said property to the defendant J. H. Cage, for the purpose of paying such community debts, and that said defendant J. H. Cage purchased said land in good faith, and without the fraud and collusion charged by the plaintiff, and paid therefor a price which under all of the surround-

ing circumstances was fairly adequate, then you will find for the defendant J. H. Cage."

It will be noted that the jury were thus, in effect, instructed that, however they might determine the other issues, they were not authorized to find for appellant unless they found that there existed an actual necessity for the sale of the land in controversy. This view was emphasized by the court in stating the converse of the proposition, the court in the same connection further instructing the jury that:

"If you should find from the evidence that there was at the time such sale was made no necessity for selling any of the community property belonging to the estate of John C. Tucker, deceased, and Mrs. P. J. Tucker, for the purpose of paying community debts, * * * you will find for the plaintiffs for one-half of the community interest of John C. Tucker and P. J. Tucker in said land."

In so instructing the jury we think there was error for which the judgment must be reversed.

The facts without dispute show that the 600 acres of land involved in this controversy was the community property of John C. and P. J. Tucker, and that at the time of John C. Tucker's death and at the time of the conveyance by Mrs. P. J. Tucker to appellant there existed community debts of which at least $700 was secured by the vendor's lien on said land. It is the settled law of this State that community property descends, if at all, charged with the payment of community debts, and that a community survivor has the power to convey community property in payment of such debts. In speaking of this power our Supreme Court, in the case of Sanger Bros. v. Heirs of Moody, 60 Texas, 100, say: "The power of the survivor is certainly a general power to sell for the purpose of paying any and every debt the community estate may owe." If the power so vested by law in the community survivor is a general one it must follow, as in the case of the exercise of any other general power committed by law or otherwise, that the discretion and responsibility involved in its exercise rests upon the agent to whom the power is committed. The burden is upon one claiming through a transmitting agent of general powers to show that the power to convey in fact existed in the agent, but the purchaser is not required to show that sound discretion and judgment was used in its exercise, nor to see that the agent properly applied the proceeds. So that we think it was error to, in effect, require a finding that the sale in question was necessary as a mater of fact before appellant could recover. See Wenar v. Stenzel, 48 Texas, 484. In what we have said, however, we do not wish to be understood as holding that evidence of a want of necessity for the sale under consideration is not relevant in this case. It is so only, however, on the issue of fraud and collusion charged. If in fact community debts existed, and for the purpose of their payment the sale was made in good faith by Mrs. Tucker and without the fraud and collusion charged, then appellant took good title whether there existed a real necessity for the sale or not. If no necessity for a sale existed, however, that fact may be considered together

with all other circumstances in determining whether the sale was made in good faith by Mrs. Tucker for the purpose stated, and whether appellant in his purchase was guilty of the fraud and collusion charged. See Eastman v. Smith, 11 Texas Civ. App., 133.

That the error discussed was prejudicial we think apparent from the fact that while there was evidence to show that the sale to appellant was made in good faith and for the purpose of paying subsisting community debts, there was also evidence tending to show that no immediate necessity for a sale existed. Mr. Hyatt, the owner of the vendor's lien debt mentioned at the time of John C. Tucker's death, testified that he "talked to Mrs. Tucker about the payment" of the debt referred to, "but never threatened to sue," that he remembered. Mrs. Tucker testified on this point that "Mr. Hyatt told me that he did not intend to push me about the notes, and if I would have stayed on the place I could have, with a crop or two, paid the Hyatt notes—the rent would have done so." The jury, therefore, may have found against appellant on the ground that there was no necessity for the sale, as they were required to do under the charge if they so believed, although they further believed that Mrs. Tucker made the sale for the purpose of paying community debts and that appellant purchased without the fraud and collusion charged.

In view of another trial we think it not improper to suggest that the charge quoted above might be further relieved of objection by eliminating the terms "good faith" as a qualification of the community debts, inasmuch as no issue in the pleadings or proof seems to have been made as to the validity of the community debts of John C. Tucker and wife.

The requirement of the charge that appellant should pay a price that was "fairly adequate" should be eliminated.

For the error discussed, the judgment below is reversed and the cause remanded.

Reversed and remanded

CASS COUNTY v. WILBARGER COUNTY.

Decided January 12, 1901.

1.—County Bonds—Funding Indebtedness—Coupons.

County bonds issued under the Act of April 14, 1889, for the purpose of funding the county's indebtedness, were not rendered invalid by the fact that, instead of making the principal payable in twenty years, with coupons for the annual interest, the bond and coupons provided for payment each year of the annual interest, and also the 2 per cent of principal for which the act authorized the levy of taxes.

2.—Same—Innocent Purchaser—Notice of Law.

A purchaser of county bonds showing on their face that they were issued by virtue of an act of the Legislature specifically recited therein is bound to take notice of the purpose and provisions of such act, and the decisions of the courts holding that counties can not issue bonds unless expressly authorized by law to do so.

3.—Same—Purchaser Protected in What.

But an innocent purchaser will be protected where the power of the commissioners court to issue the county bonds depended upon facts to be ascertained and conclusions to be reached by that court as to the probable county expenses, and amount of revenue required, and likely to arise from taxation, to meet the same during the life of the bonds, though the conclusion of the court upon such facts was erroneous.

4.—Same—Constitutional Law—Current Expenses of County.

Section 9, article 8, of the Constitution, as amended in 1883, did not prohibit the commissioners court from levying, under the Act of 1889, an annual tax to meet the principal and interest of bonds issued for funding general county indebtedness, though such levy, by consuming a part of the 25 cents on the $100 valuation, permitted by the Constitution to be levied for "county purposes," impaired to that extent the power to make future annual levies for meeting the necessary current expenses of the county, the debts so funded being already payable out of taxes to be levied for county purposes.

5.—Same—Queries as to Constitutional Law and "Creation of Debt" by Funding.

See the opinion for question suggested and discussed, though not authoritatively determined, as to whether, under section 9 of article 8 of the Constitution, as amended in 1883, a county may be empowered to levy a tax for meeting its past indebtedness in addition to the 25 cents on the $100 permitted to be levied for county purposes; and also as to whether the funding of a debt by the issuance of bonds is the creation of a debt within the meaning of the constitutional provisions requiring a tax levy to pay the interest and create an adequate sinking fund to absorb the principal.

6.—Same—Proofs of Sufficiency of Levy to Pay Bonds.

Where the tax levy made sufficed to meet for the first five years the payment of principal and interest falling due on county bonds, this made a prima facie case, if the burden was upon the holder of the bonds to show sufficiency of the levy; but if it did not, see recitals in the face of the bonds and facts proven sufficient to bring the case within the estoppel declared by the validating Act of April 20, 1899 (amendatory of Revised Statutes, articles 3892-3894).

Error from Wilbarger. Tried below before Hon. G. A. Brown.

Montgomery & Hughes, for plaintiff in error.

Huff & Hall, for defendants in error.

STEPHENS, ASSOCIATE JUSTICE.—Under an act of the Legislature entitled "An act to authorize counties to fund their indebtedness and to provide means to pay the same," approved April 14, 1889 (Acts of 1889, page 89), the Commissioners Court of Wilbarger County made and entered an order, February 14, 1890, providing for the issuance of forty bonds to the amount of $20,000, that being the amount of the outstanding indebtedness of Wilbarger County incurred prior to the 1st day of January 1889, for current expenses, and represented by valid county warrants duly registered and payable out of the common or third class funds, the bonds, in denominations of $500, to become due in twenty years, but to be paid off at any time after two years at the pleasure of the county, and to bear interest at the rate of 6 per cent per annum, payable annually. The order also provided that 2 per cent of the principal should be paid annually and included in the interest coupons to be attached to the bonds.

The order further provided for a tax levy as follows: "That a tax of 5 cents on the $100 valuation of all property in said county subject to taxation be and is hereby levied for the purpose of paying the interest and annual 2 per cent of the principal of said bonds and the costs of collecting and assessing said tax, and that this levy of taxes shall continue in force until the whole amount of the principal and interest of said bonds shall have been fully paid."

The following is a copy of one of the bonds:

"No. 21. "$500.00

"THE STATE OF TEXAS, COUNTY OF WILBARGER.

"The county of Wilbarger, in the State of Texas, acknowledges itself to be indebted to bearer in the sum of five hundred dollars, and promises to pay same in lawful money of the United States as follows: Three hundred dollars thereof on the 10th day of April in the year 1910, and $10 on the 10th day of April of each year prior to 1910; together with interest at the rate of six per cent per annum, which interest shall be payable on the 10th day of April in each year, and shall be computed on the balance of the principal due from time to time. The said installments of principal and interest to be evidenced by coupons hereto attached. Principal and interest payable at the St. Louis National Bank, in the city of St. Louis, State of Missouri. This bond is redeemable at any time after two years from the date of its issuance and before maturity at the pleasure of the county. This bond is issued under and in compliance with the Constitution and laws of the State of Texas, and particularly an act entitled 'An act to authorize counties to fund their indebtedness and to provide means to pay same, approved April 14, 1889,' and for the purpose of settling and funding an existing indebtedness lawfully made and undertaken by said county, by authority of law, prior to January 1, 1889, which said indebtedness so created amounts to the sum of twenty thousand dollars, and was created on account of valid subsisting and unpaid county warrants, issued in settlement of claims allowed by the commissioners court for current expenses of said county incurred prior to January 1, 1889. This bond is one of a series of forty bonds of the same tenor and effect, and is further issued under and by authority of the order of the Commissioners Court of Wilbarger County, made at a regular term thereof on the 14th day of February, 1890, a full court being present.

"Witness the county judge of said Wilbarger County, Texas, attested by the county clerk thereof, and with the seal of the County Commissioners Court affixed thereto, on this 14th day of February, 1890.

"Attest: L. N. PERKINS, County Clerk Wilbarger County, Texas.

[Seal] "L. C. HEARE,

"County Judge, Wilbarger County Texas.

"Registered in my office the 14th day of March, 1890.

"W. A. MCKINNEY,

"County Treasurer Wilbarger County, Texas."

The following is a copy of one of the coupons:

"No. 6. "$37.00

"The County of Wilbarger, State of Texas, will pay to the bearer on the 10th day of April, 1896, at the St. Louis National Bank, St. Louis, Mo., ten dollars, being two per cent of the principal bond No. 21, and twenty-seven dollars interest to said date on said bond.

"L. C. HEARE,
"County Judge Wilbarger County, Texas.

"Attest: L. N. PERKINS,
"County Clerk Wilbarger County, Texas."

On this issue of coupon bonds eleven, being those put in issue in this suit, were acquired by appellant at the time and in the manner stated in the following testimony of the county judge of Cass County: "They were bought from J. W. Campbell, cashier of the First National Bank of Atlanta, Texas. I bought the bonds for Cass County under authority of an order of the Commissioners Court of Cass County, passed on June 16, 1893, a certified copy of which is hereto attached and marked exhibit A. Cass County purchased said bonds through me from J. W. Campbell in June or July, 1893. I paid $1 or $1.02 on the dollar for them. The money was paid to J. W. Campbell by me. That is, the county treasurer paid same in my presence and received the bonds. There was no warrant issued. The money was paid out of the non-available or permanent school fund of Cass County. Neither myself or any of the county commissioners of Cass County knew anything about said bonds or coupons except what said bonds and coupons showed on their face, at any time before same were acquired and the money for them actually paid by Cass County. They appeared to be all right on their face, and no investigation was made. We knew nothing about the issuance of said bonds except what is shown on their face. I don't remember to have ever submitted said bonds to the attorney general. I never made any examination of the records of Wilbarger County."

The fourth paragraph of the statement of facts shows that: "It was admitted by the defendant that the bonds and coupons sued on, together with the other like bonds referred to in the order authorizing their issue, were sold by Wilbarger County, Texas, to defendant for $20,050 in cash, and that said sum was actually received by the county treasurer of Wilbarger County on the 18th day of March, 1890, and that Wilbarger County regularly paid the interest and payments of principal as provided by the coupons attached to said bonds, from their issuance up to and including the interest falling due April 10, 1895, and that the interest and principal coupons falling due on the bonds sued on, due on April 10, 1894 and 1895, was paid to plaintiff, Cass County."

From the foregoing statements and quotations it is evident, we think, that the first objection interposed to the bonds and coupons sued on,

to wit, that instead of bonds for $500 each, payable in twenty years, with annual interest coupons attached, 2 per cent of the principal sum was included in the interest coupons, should have been overruled. Acts 1889, p. 89; Acts 1899, p. 143; Nolan County v. State, 83 Texas, 201, and authorities there cited. At all events, if the Act of 1889 was not substantially complied with in the manner of issuing the bonds, and the defect was not cured by the Act of 1899,—counsel for defendant in error contending that that act is in conflict with section 53, article 3, of the Constitution, supposed by them to have been overlooked in State v. Nolan County, supra,—the bonds were not on that account wholly invalid, as seems to have been held in the judgment appealed from. Noel Young Bond Co. v. Mitchell County, 21 Texas Civ. App., 638, in which writ of error was refused.

The main and most serious objection raised to the bonds was that the Commissioners Court of Wilbarger County had no power to make the tax levy of 5 cents, as shown in the order, to pay them, because it was not a levy for "county purposes," or, if so, it was an attempt to limit future commissioner courts to an annual levy for "county purposes" of only 20 instead of 25 cents, as provided in the Constitution. Section 9 of article 8 of the Constitution, as amended in 1883, prohibited any county from levying for any year more than 25 cents on the $100 valuation of the taxable property of the county for "county purposes," from which it is argued that that per cent of taxation was intended to be reserved by the Constitution to meet the annual expenses of county government, for otherwise the commissioners court might, in the issuance of bonds under the Act of 1889 cited above, by levying for a series of years the full 25 cents for their payment, render a county incapable of performing its political functions. This contention seems plausible, but is met or sought to be avoided with the proposition, among others, that as Cass County was an innocent purchaser of the bonds in question, the defense, if otherwise tenable, was not available in this case, since there was nothing on the face of the bonds or the order under which they were issued to charge the said county with notice of any fact rendering them invalid; each bond, on the contrary, reciting that it was "issued under and in compliance with the Constitution and laws of the State of Texas." The bonds, however, showed on their face that they were issued under the Act of 1889, and plaintiff in error was bound to take notice of its purpose and provisions, and of that line of decisions holding that counties in Texas can not issue bonds unless expressly authorized by law to do so. Ball v. Presidio County, 88 Texas, 60.

Looking to the provisions of the Act of 1889, we find that it authorized the commissioners courts to levy a tax not to exceed 25 cents on the $100 to pay the annual interest, and not less tnan 2 per cent annually of the principal of the bonds to be issued to fund county indebtedness as therein provided, the levy to remain in force till both principal and interest of the bonds should be fully paid, but it prohibited the issu-

ance of any such bonds until such levy should first be made, and also contained the proviso, "that nothing herein shall be considered to authorize any county to levy any tax in excess of that authorized by the constitution and the laws now in force." The emergency clause of the act contains this recital: "Whereas many counties in this State are burdened with overdue indebtedness, and are not able to provide for the payment of the same, and also to pay their current expenses," etc. Such was the condition of Wilbarger County when the bonds in question were issued, and Cass County was bound to take notice of that fact, as well as of the purpose for which the bonds were issued and the requirements of the act under which they were issued. Merely because the bonds contained the general recital that they were "issued under and in compliance with the Constitution and laws of the State of Texas," did not of itself afford protection to the purchaser, since they also recited the particular act under which they were issued.

This conclusion is not, we think, in conflict with the decision of the United States Supreme Court in Gunnison County v. Rollins, 173 United States, 256, so much relied on by plaintiff in error, in which the previous decisions of that court affecting such questions were thoroughly and ably reviewed. We think, however, that that case is good authority for holding that plaintiff in error would be protected as an innocent holder if the power of the Commissioners Court of Wilbarger County to issue the bonds in question depended upon facts to be ascertained and conclusions to be reached by that court as to the probable county expense, and amount of revenue consequently required and likely to arise from taxation to meet the same during the life of the bonds. That is to say, if the Commissioners Court of Wilbarger County in issuing the bonds erroneously concluded from facts best known to that body that an annual tax of 20 cents would be sufficient to meet the current expenses of the county during the period covered by the bonds, leaving 5 cents to be applied to interest and 2 per cent annually of the principal of the bonds, Cass County would not be affected by such erroneous conclusion, but would be entitled to protection as an innocent purchaser, unless the Constitution prevented what might otherwise have been done under the Act of 1889.

We proceed, therefore, to determine the constitutional question raised, that is, whether or not it was competent for the Legislature, in passing the Act of 1889, to authorize commissioners courts of counties situated as Wilbarger County was to fund their debts by issuing bonds and levying a tax to pay the same as provided in that act. In view of the proviso quoted above, that the act was not to be considered as authorizing the levy of any tax in excess of what was authorized by the Constitution and laws then in force, the inference seems to be a natural if not an irresistible one that the Legislature contemplated that the power to make the tax levy required by that act was included within the authorized power to levy a tax for "county purposes," and especially so since the debts to be funded were already payable out of taxes derivable from

that source. Rev. Stats. 1879, arts. 961-969. Doubtless the Legislature took the view that, if registered warrants were so payable, it was competent to raise the money to pay the bonds issued to fund them in the same way.

But in support of the opposite view, counsel for defendant in error quote from the opinions in the following cases: City of Sherman v. Langham, 92 Texas, 13; McNeal v. City of Waco, 89 Texas, 83; Bank v. City of Terrell, 78 Texas, 460, and Nalle v. City of Austin, 42 S. W. Rep., 780. These quotations are to the effect that the current expenses of city governments for each year are a first charge on its general revenues for that year, and that a city council is without power to pledge its future current revenues to the payment of interest and sinking fund on its bonded indebtedness. But the cases themselves do not seem to be altogether in point, and can hardly be quoted as authority upon the constitutional question to be determined in this case. Evidently the Legislature, in enacting the law of 1889 for the benefit of counties in this State which were burdened with overdue indebtedness and not able to provide at the same time for the payment of such debts and current expenses, must have contemplated, as already seen, that relief was to come from the issuance of bonds payable out of a fund to be raised by taxation in some such manner as was attempted by Wilbarger County. The object in view was a good one. Unless the act was clearly unconstitutional it ought to be upheld, for to invalidate the bonds in question would be equivalent to invalidating the law itself. The debts which the bonds were issued to pay were valid debts created from year to year for current expenses of the county, and were within the spirit as well as letter of the Constitution providing for a tax of 25 cents for "county purposes."

It has been held that legislative provisions for funding debts are to be favorably and liberally construed. Langham v. City of Sherman, supra. Seeing that many counties were unable to make suitable provisions for both overdue and current expenses of municipal government in the usual way, and that by the issuance of bonds to cover the overdue debts a portion of the constitutional taxing power might reasonably be exercised for a series of years to pay off the bonds without serious inconvenience to the counties in the discharge of their current expense obligations, the Legislature saw fit to confer upon the commissioners courts of counties so situated the power of issuing such bonds and of making a suitable levy of taxes for their payment, and we think the law should be sustained. If the levy in question had been made to pay the original warrants, which were a charge upon the current revenues, and were paid substantially out of the proceeds of the bonds, the Constitution would not have been violated; and we see no good reason why a different construction should be adopted merely because the form of the county's obligations was changed. See the reasoning of those courts that hold the issuance of funding bonds not to be the creation of a debt within the meaning of constitutional provisions like section 7, arti-

cle 11, of our Constitution. Insurance Co. v. Meade, 82 N. W. Rep., 78; 48 Law. Rep. Am., 785. It was for the commissioners court, in the exercise of discretion, to determine as to the propriety and manner of the exercise of this power, which necessarily included the placing of limitations upon the power of future commissioners court, which it was competent for the Legislature to authorize, and which has in many instances been authorized.

But, if it be conceded that a tax levied to pay bonds issued, as the bonds in question were, for the purpose of funding what is termed in our law "the general indebtedness of the county" (Revised Statutes, article 852, and Revised Statutes of 1879, article 962) is not a tax levied for "county purposes" within the meaning of the Constitution, whether so intended in the Act of 1889 or not, it would yet remain to be determined whether such a tax was inhibited by the Constitution as amended in 1883, which was in force when the Act of 1889 was passed and the bonds in question were issued. Const., art. 8, sec. 9, as published with the Revised Statutes of 1895, where the original and amended sections are both printed. The Constitution adopted in 1876 placed a limitation as to the amount of taxes to be levied by counties upon the whole taxing power, except for the payment of debts which had been "already incurred." But the amendment of 1883 was differently worded, and seems to have placed the restriction as to amount to be levied, not upon the whole taxing power, but only upon that power when exercised to accomplish given purposes, to wit, to raise revenue for county purposes, roads and bridges, and the erection of public buildings. It will be noted that neither in the Constitution originally adopted, nor in the amendment, was any restriction imposed as to the amount of taxes to be levied to pay debts "already incurred." It may be, therefore, that in amending the Constitution there was a purpose on the part of those proposing and voting for the amendment to enable counties to meet conditions of indebtedness to arise in the future, as they had arisen in the past, by leaving them free to levy such an amount of tax as might be required for that purpose. If so, the tax in question might be upheld upon that ground, as it was made a part of the contract embodied in the issuance of the bonds, and the bonds were validated by the Act of 1899, "unless fraudulently issued or issued in violation of constitutional limitation." Act 1899, p. 143, amending Rev. Stats., arts. 3892-3894.

These views, however, are merely suggested, and are not intended to be authoritatively announced; to which may be added the further observation that the question whether or not the funding of a debt by the issuance of bonds is the creation of a debt within the meaning of constitutional provisions requiring a tax levy to pay the interest and create an adequate sinking fund to absorb the principal, is one upon which we find courts of the highest authority outside of this State in hopeless conflict, but which does not seem to be very important in this

case; especially as the bonds would seem to be of little value apart from the tax levy in question. Insurance Co. v. Meade, supra.

One other question raised will be noticed. Counsel for defendant in error submit the counter-proposition, that the burden was on plaintiff in error to show that the tax levy of 5 cents per year on the $100 valuation was insufficient in amount to pay the interest and 2 per cent of the principal of the bonds; but conceding the full force of this, we find that the levy was in fact sufficient for the first five years, which would seem to make a prima facie case; but if not, the recitals in the face of the bonds and facts proven to bring the case within the estoppel declared by the validating act evidently did.

We conclude that the judgment should be reversed and here rendered for plaintiff in error, as prayed for in the alternative prayer of the first count of the petition.

Reversed and rendered.

Writ of error refused by the Supreme Court.

S. J. CLARK v. J. B. MCKNIGHT.

Decided January 12, 1901.

1.—State School Land—Proof of Reclassification and Appraisement—Presumption from Record.

Where it appears from the statement of facts that the State school lands in controversy were reclassified and appraised, the dates thereof and the prices fixed being recited, it will be presumed in favor of the judgment that the reclassifications and appraisements were duly made by the proper authority, and objection to the effect that there had been no legal reclassification or appraisement and application to purchase in conformity thereto, unsupported by evidence in the bills of exception, or otherwise, can not be sustained.

2.—Same—Forfeiture—Improvements—Fixtures.

Improvements placed on State school land by a purchaser of such character as to become fixtures will pass to the State on a legal forfeiture of the contract of purchase.

3.—Improvements Claimed by Lessee.

Where one asserting right to State school land under a lease seeks, under Revised Statutes, article 4218s, to avoid a subsequent sale of the land by the State on the ground that he owned improvements on the land worth more than $200, and that he had bought such improvements from a prior owner, whose contract of purchase with the State had been forfeited, it devolved on him to show the extent and value of such improvements, and that they were in the nature of personalty.

4.—Same—Additional Lands—Lease Subordinated to Sale.

One who shows himself to be a purchaser of and actual settler upon a section of State school land, and a fair and regular purchase by himself from the State of an additional section of grazing lands situated within a radius of five miles of his home section, after due classification and appraisement thereof, is entitled to recover such additional sections from one claiming under a lease thereof who fails to show that he had placed or acquired improvements thereon of the value of $200.

Appeal from Childress. Tried below before Hon. G. A. Brown.

Stovall Johnson and *Theodore Mack,* for appellant.

Edward E. Diggs, for appellee.

CONNER, CHIEF JUSTICE.—This suit was instituted by appellee in the District Court of Childress County on the 21st day of September, 1899, to recover of appellant the title and possession of State school land section No. 6, block No. 9, surveyed by the Houston & Great Northern Railway Company. The petition was in the usual form of petitions in trespass to try title, to which appellant Clark interposed the plea of "not guilty."

Appellee McKnight was the owner of and an actual settler upon section No. 42, block 9, State school land, of the same survey, situated within a radius of five miles of the section in controversy, and as such claimed title and right to the latter by virtue of his application and obligation to purchase the same as additional lands, made on July 5, 1899. Appellant Clark claimed as the assignee of one W. R. Harvey, who, on August 4, 1898, had leased said section 6 from the State for the term of five years, and whose lease had been duly filed and recorded in Childress County, August 6, 1898.

After the introduction of the evidence, the court peremptorily instructed the jury to find for the plaintiff, McKnight, which the jury accordingly did; and appellant Clark duly brings this cause before us on appeal from the judgment in McKnight's favor, assigning errors to the several proceedings below as hereinafter stated.

The first and third assignments of error question the court's action in admitting the classification and appraisement of appellee's home section, No. 42, and the classification and appraisement of section 6, the additional land applied for by him, on the ground, substantially, that it appeared from the certificate of the Commissioner of the General Land Office to said classifications and appraisements that section 42 "was classified and appraised at $2 per acre, and has never been changed," and that section 6 "had never been classified nor appraised." The second and fourth assignments are dependent on the first and third; it being therein insisted, in substance, that appellee's applications and obligations did not conform to any legal classification and appraisement. The materiality of the questions thus presented is of course apparent, but the difficulty in a determination thereof in appellant's favor lies in the fact that the record fails to sustain the objection made. The bills of exception taken by appellant to the introduction of this testimony fail to set out the appraisements and classifications in question, or the certificate thereto mentioned in his objections, and, as evidenced by the statement of facts, it appears that prior to 1897 section 42 was duly classified as dry agricultural land and appraised at $2 per acre, and so remained until August 20, 1897, when the appraisement was "changed to $1.50 per acre, in con-

formity to the minimum price fixed by the Act of 1897 for sale of agricultural school lands," and on September 16, 1897, was "reclassified as dry grazing land;" and that section 6 had likewise been classified as dry agricultural land and appraised at $2 per acre November 30, 1887, and so remained until August 20, 1897, "when the price was changed to $1.50 per acre, as per minimum fixed by Act of 1897," and so remained until April 18, 1898, when the north one-half of section 6 "was reclassified as dry grazing land and appraised at $1 per acre." In this state of the record we must assume in aid of the court's action that the reclassification and appraisements mentioned were duly made, and, it not appearing that appellee's applications, affidavits, etc., were not in conformity therewith, said assignments from one to four inclusive are all overruled.

It appears from the evidence that sections 42 and 6 had been sold under the Act of 1887, and acts amendatory thereof, and afterwards duly forfeited by the Commissioner of the General Land Office for nonpayment of interest due the State for the year ending August 1, 1894, and appellant offered to prove by W. R. Harvey, under whom he claims, that said Harvey owned said section 6 at the time of its said forfeiture and then had thereon improvements of "more than the value of $1500," and that said Harvey, after said forfeiture "had put on the said land" improvements of "more than the value of $200." The rejection of this evidence is made the basis of appellant's fifth assignment of error.

The trial judge, in explanation of the bill of exceptions taken to the exclusion of this testimony, says, "that the witness Harvey stated in connection with the proof offered that the improvement made by him after the forfeiture was made prior to the leasing of the land from the State, and was not made while he was the lessee thereof from the State." The state of the proof as it appears in the statement of facts was: "Some little improvements was put on this section (section 6) by Harvey after he leased from the State, and some were put on it by defendant (Clark) after his purchase from Harvey, and prior to plaintiff's application to purchase, but the improvements were of little value."

Appellant's contention is, in substance, that the forfeiture of the sale to Harvey declared by the Commissioner did not divest him of the improvements thereon then owned by him, and that appellant, by assignment of Harvey's lease afterwards taken out, acquired title thereto. In the case of Sims v. Wright, 56 Southwestern Reporter, 110, the Court of Civil Appeals for the Fourth District, in an opinion by Fly, Justice, held that the declaration of forfeiture by the Commissioner of the General Land Office cut off all equities of the purchaser. Without wishing to be understood as approving this decision in its broadest sense, we nevertheless think and have distinctly indicated that improvements placed on school lands by a purchaser of such character as to become fixtures will pass to the State on legal forfeiture of the contract of purchase, together with the land of which they constitute a part. See Shelton v. Willis,

23 Texas Civil Appeals, 547. If appellant desired to defeat appellee's application to purchase section 6 by reason of improvements placed thereon by Harvey, and thus bring himself within the spirit, perhaps, of the second clause of the exception contained in article 4218s, Revised Statutes, the burden was upon him to show that such improvements were of such a character, or had been placed on said section by Harvey with such intent and under such circumstances as to show their personal character, and that the same did not vest in the State at the time of the forfeiture shown, nor at the time placed thereon by Harvey, but that, on the contrary, such improvements duly passed to him, appellant, as the owner. Shelton v. Willis, supra. No evidence of such tendency was offered so far as we are able to judge from the bill of exceptions or statement of facts; and hence, we are unable to say that appellant has legal ground of complaint in the rejection of the evidence offered in the bill.

In the remaining assignment it is insisted that the court erred in peremptorily instructing the jury to return a verdict for appellee. We think this assignment also must be overruled. The evidence admitted of no other finding. It established appellee's ownership of and actual residence upon said section 42; that section 6, involved in this suit, was State school land duly classified, appraised, and placed upon the market for sale, and within a radius of five miles of appellee's home section; that appellee made due application to purchase the same which, with the obligation and first payment required by law, was properly forwarded and deposited with the proper State officers. The right to recover was thus established, notwithstanding the existence of the lease interposed by appellant, it not appearing that he had placed or acquired improvements thereon of the value of $200. Rev. Stats., arts. 4218f, 4218s; Gen. Laws 1897, p. 184.

Finding no error in the proceedings, the judgment of the District Court is affirmed.

Affirmed.

Writ of error refused.

FORT WORTH & DENVER CITY RAILWAY COMPANY v. J. M. BURTON.

Decided January 12, 1901.

Argument of Counsel—Improper Remarks—Prejudicial Error.

Where, in a railroad grass-burning case, counsel for plaintiff, in his argument to the jury, stated that the depositions in the case of defendant company's engineers and boiler inspector as to the inspection and condition of the engines were the same, and almost verbatim copies, of the first deposition that was ever used in a grass-burning case, and that these engineers are always engineers of fifteen to twenty years experience, etc., such remarks were prejudicial error, requiring a reversal of the judgment.

Appeal from the County Court of Wise. Tried below before Hon. S. G. Tankersley.

Stanley, Spoonts & Thompson and *Robert Harrison,* for appellant.

A. J. Clendenen, for appellee.

CONNER, CHIEF JUSTICE.—J. M. Burton brought this suit in the County Court of Wise County, Texas, against the Fort Worth and Denver City Railway Company, on January 21, 1900, alleging that he was the owner of certain lands adjacent to the defendant's right of way, and that the defendant, by its negligence, set fire to the grass upon these lands, and destroyed the grass and turf thereon, and in said fire destroyed certain fence posts and damaged wire fence, to his total damage in the sum of $442.45.

The defendant answered by general denial, and specially that if the plaintiff was damaged by fire, as alleged, that it was guilty of no negligence, in that its engines were equipped with the best known apparatus for the prevention of the escape of fire, and that they were properly and carefully handled, and that its employes were prudent men, and that, if the fires were set out, they were not caused by any negligence of the defendant. The case was tried on April 19, 1900, and judgment was rendered in favor of plaintiff for $386.70. Motion for new trial was duly filed and overruled, and the case is brought to this court on appeal.

The evidence tends to show that the fire in question was started by a spark or sparks from passing engines, but is conflicting as to whether the fire spread from appellant's right of way, or from a point on appellee's land. Appellants's evidence also tended to show that the engines which set out the fire were engines of north-bound passenger trains, and the engineers of these trains testified that the engines were in good condition in very respect, and that no more sparks were escaping than necessarily or ordinarily escaped in the operation of an engine; and that they were competent and skillful engineers, and handled the engines with all the care possible. The boiler inspector for the defendant, whose duty it was to inspect the engines and keep them in repair, testified that he had inspected the engines very shortly before going out on each of the trips in question, and very shortly after coming in therefrom, giving the results of the inspection, and in detail the manner and parts of the engine that were inspected, and that on the occasion of each of these inspections, everything about the engine and all the appliances were in good condition. This testimony does not appear to be controverted by any direct evidence offered in behalf of appellee. On the trial, however, appellee's counsel in his argument to the jury made the following statements, as appear from several bills of exception duly reserved thereto at the time, viz.: "That the deposition in the case, of the engineers and boiler inspectors, with reference to the care they had used in rgard to handling the engines and inspection of the apparatus, is the same, and

almost verbatim copies of the first deposition that was ever used in a grass burning case. * * * These engineers are always engineers of fifteen or twenty years experience, and one never appeared in court to testify in behalf of his company in a grass burning case, since these cases have been brought, except that he was an experienced engineer of this sort. * * * All these engineers, in suits like these, always say they can remember how they were running at such time, and this has been the case since grass cases were first brought in the courts, and the books are full of such cases."

These remarks were duly excepted to at the time, and were entirely unsupported by any evidence in the record, and no correction thereof appears to have been attempted by the court, if indeed a charge to the jury to disregard them would in any event remedy such breach of the rules pertaining to a fair trial. In answer to these assignments, it is insisted that the evidence of negligence sustains the recovery in appellee's favor and the verdict is not excessive, and that therefore the remarks complained of "could not possibly have influenced the jury improperly." We have been unable to so conclude. The evidence was sharply conflicting on both of these issues. The argument was in the nature of testimony by a witness purporting to have in such matters exceptional knowledge of facts not generally known to be true, and pertinently affecting the weight and credence to be given the testimony of witnesses in behalf of appellant otherwise unimpeached. As was said in Dillingham v. Scales, 78 Texas, 207: "The remarks of counsel excepted to were not justified or called for by anything legitimately applicable to the case. We can not say that they did not improperly prejudice the jury. We can not say that they did not exercise any influence on the jury. If they exercised any, it was an improper one." See also Railway v. Woods, 25 S. W. Rep., 742; Railway v. Scott, 7 Texas Civ. App., 619; Garrity v. Rankin, 55 S. W. Rep., 368; Railway v. Langston, 92 Texas, 729; Wichita Mill Co. v. Hobbs, 5 Texas Civ. App., 34.

In our judgment other assignments need not be discussed, inasmuch as the court's charge and other rulings, so far as the same may become material, may easily be remedied in the light of the criticisms thereof in appellant's brief. The objectionable argument of counsel, however, will require that the judgment be reversed and the cause remanded for a new trial, and it is so ordered.

Reversed and remanded.

H. T. MANSFIELD AND WIFE v. J. Y. HOGSETT ET AL.

Decided January 19, 1901.

Costs—Fee of Stenographer Not Taxed, When.

The fee of a stenographer employed by the court at the request of a party to the suit to take down the evidence in the case can not be taxed as cost against the other party unless there is an order of court fixing the amount and allowing the item, as required by the statute. Rev. Stats., arts. 1295, 1296.

Appeal from Tarrant. Tried below before Hon. W. D. Harris.

James C. Scott, for appellants.

Orrick & Terrell, for appellees.

HUNTER, ASSOCIATE JUSTICE.—This is an appeal from the judgment of a District Court of Tarrant County, refusing to allow an item of costs to be taxed and collected in this case, after the judgment in the case had been affirmed by this court and the mandate returned to said District Court. The item of cost was the stenographer's fee of $56.

The item was not embraced in the bill of costs contained in the transcript filed in the appeal to this court, and no order of the district court is shown fixing the amount and allowing said item, as is necessary under articles 1295 and 1296 of our Revised Statutes, which provide as follows:

"Article 1295. For the purpose of preserving a statement of the evidence given on the trial of a cause, the court may, and upon application of either party shall, employ a stenographer or other competent person to take down the testimony in a cause.

"Article 1296. Reasonable compensation, not to exceed twenty cents per hundred words, shall be allowed such stenographer, to be fixed by the court and taxed in the bill of costs."

The District Court disallowed the item, it seems, upon the ground that "it did not go into the transcript on appeal, and that the same is not collectible from the plaintiffs."

The judgment of the District Court is affirmed, but because no order from the minutes of that court is shown fixing the amount and allowing the item, and therefore the party who called the stenographer must pay the bill, and is not entitled to have it taxed against the adverse party.

The judgment is affirmed.

Affirmed.

A. J. ROE ET AL. V. L. L. THOMASON ET AL.

Decided January 19, 1901.

Negligence—Intervening Proximate Cause—Injury to Employe.

In an action for personal injuries there can be no recovery because of matters of negligence on defendant's part where an intervening act as to which defendant was not negligent was the proximate cause of the injury. See findings upon special issues, such as required a judgment for the defendant, and that related to a case where a miner, working at the bottom of a coal shaft upon a defective cage, was injured by reason of an accidental and untimely hoisting of the cage, as to which there was no negligence.

Appeal from Parker. Tried below before Hon. J. W. Patterson.

Greene & Stewart, for appellant.

Haney & McKinsey and *Albert Stevenson,* for appellees.

HUNTER, ASSOCIATE JUSTICE.—The statement of the nature and result of this case is correctly and truly made by appellant's counsel, and also the grounds of recovery as set forth in the plaintiff's petition, and are as follows:

"This suit was instituted by L. L. Thomason, against appellants A. J. Roe, G. E. Bennett, Paul Waples, W. Burton, the American Coal Mining Company, and the Strawn Coal Mining Company, in the District Court of Palo Pinto County, August 29, 1898, to recover damages for alleged personal injuries received by him while working in a certain coal mine, alleged to have been operated by said defendants. It was afterwards removed by consent of parties to the District Court of Parker County.

"Said L. L. Thomason died before trial, and his widow, Mrs. L. C. Thomason, filed an amended petition making herself and minor children parties plaintiffs, she suing for them as next friend. The cause was submitted to the jury on special issues, and upon the answers of the jury thereto defendants moved for judgment in their favor, which motion was overruled by the court, and defendants excepted, and thereupon, on motion of plaintiffs, the court entered in their favor personal judgment against A. J. Roe, G. E. Bennett, Paul Waples, W. Burton, and the American Coal-Mining Company for $7600, and against the Strawn Coal-Mining Company decreeing said above judgment a lien on certain real estate of said latter company, and that the same be foreclosed and said real estate sold for payment of said judgment. From this judgment this appeal is taken.

"By the petition plaintiffs aver that A. J. Roe, G. E. Bennett, Paul Waples, W. Burton, and the American Coal Mining Company, were, on December 22, 1897, operating a coal mine at Mineral City, Palo Pinto County, Texas, being interested together therein; that on that day L. L. Thomason was in the employ of said company, and had been placed at the bottom of the mine shaft, where it was his duty to assist in shifting

empties and placing loaded cars on the cage preparatory to the same being hoisted to the surface; that while engaged in placing a loaded car on the cage, he being on the cage for that purpose, the said cage was, without fault on his part, and by the negligence of the defendants, suddenly hoisted, and he, said Thomason, caught between the cage and shaft timbers, and thereby received the injuries complained of.

"The petition further alleges, in substance, that the negligence of the defendants causing the injuries of said Thomason, consisted. (1) In that the engineer, who operated the engine at the top of the shaft by which the cage was hoisted, suddenly and without warning hoisted and jerked the cage up, and thereby caught and injured said Thomason. (2) In that the bottom timbers supporting the cage and the sheetiron surface surrounding it had been allowed to become decayed or misplaced, so that the loaded cars could not be placed thereon without help from some one on the cage to pull on and adjust the same. (3) In that the bottom of the cage and the platform were allowed to become wet and slippery, and the bottom of the shaft not sufficiently lighted. (4) In that the lever by which the signals was given to the engineer above was negligently placed so that employes in the performance of their duties at bottom of shaft were liable, without fault on their part, to give the signal for hoisting accidentally.

"The petition does not charge any connection whatever between the injuries received by said Thomason and the alleged condition of the timbers under cage and platform, as set out in item number 2, above, nor with alleged condition of the bottom of cage and platform as set out in item number 3, above, except that said conditions rendered it necessary for Thomason to be on the cage at the time he was hurt. The petition alleges that after the institution of this suit said L. L. Thomason died, and this his death was caused by the injuries received by him as aforesaid."

The answer contained a general denial and some special matters which it is not necessary to note. The case was submitted to the jury on seventeen special issues, but it will only be necessary to notice the following, with the findings of the jury thereon:

"3d Issue: If the said L. L. Thomason was hurt and injured while working for the said defendant, the American Coal Mining Company, was or was not such hurt and injury caused by the negligence of the defendant American Coal Mining Company or by its agents and employes?"

"To the 3d issue, we find that it was."

"4th Issue: Did or did not the engineer at the top of the shaft receive a signal to hoist the cage at the time L. L. Thomason was hurt?"

"To the 4th issue, we find that he did."

"5th Issue: Was or was not the signal to hoist the cage given from below by any employe of the company (if any was given at all) at the time the said Thomason was injured,. and if so, by what employe was the same given, and was the same given purposely or by accident?"

"To the 5th issue, we find no, unless by accident."

"5½ Issue: Was or was not the arrangement for signaling from the foot of the shaft to the engineer at the top, as it existed at the time Thomason was hurt, the same or different from that usually and customarily used in coal mining for that purpose?"

"5½ issue, we find it was the same."

"6th Issue: Did or did not the defendant, the American Coal Mining Company, furnish the said L. L. Thomason a reasonably safe place to work, and reasonably safe appliances with which to work; and if you find they did not, then did or did not said company use ordinary care to furnish said Thomason a reasonably safe place to work, and to furnish said Thomason safe appliances with which to work? And if said company failed to use such care, was the said Thomason hurt and injured by reason of such failure to so use such ordinary care?"

"To the 6th issue, we find they did not; and we find further that they did not furnish a reasonably safe place to work or safe appliances to work with, and such failure causing said Thomason to get hurt or injured."

"7th Issue: Was or was not the American Coal Mining Company guilty of negligence in hoisting the cage in which said Thomason was at work at the time of his injuries? And was or was not said company guilty of negligence in the manner and place in which it kept and maintained the signal wire and lever at the bottom of the shaft? And if so, did such negligence cause the injury to said Thomason, and without negligence on the part of the said Thomason that contributed to his injuries?"

"To the 7th issue, we find that it was not negligence in the hoist, nor was it negligence in the manner and place in which the wire and lever was kept at the bottom of the shaft, but find that the fault or negligence was in the construction of the cage bottom, or car track, or by allowing same to get out of repair, causing said car to hitch or get off of said track, thereby placing or causing to be placed the said Thomason in an unsafe place to work, and in a place where he might, by accident, have caused said signal to be given without negligence on the part of the said Thomason."

"8th Issue: Did or did not the said Thomason, at the time of the hurt, give a signal to hoist the cage, and if so was he guilty of negligence in so giving the same? And did such negligence contribute proximately to the injury of the said Thomason?"

"To the 8th issue, we find if the said signal was given by the said Thomason, it was given by accident on said Thomason's part, and not negligence."

"9th Issue: Did or did not the said Thomason, at the time he was hurt, attempt to leave the cage, and if so, was he guilty of negligence in so attempting to leave said cage at the time? And did or did not such negligence contribute proximately to the injury of the said Thomason?"

"To the 9th issue, we find that he attempted to leave the cage, but was not guilty of negligence on his part in doing so."

Upon these special findings the defendants moved the court to render judgment for them, which was overruled, and errors are assigned to the refusal of the court to grant said motion, and to the action of the court in rendering judgment for the plaintiffs on said verdict; it being contended by appellant's counsel that the proximate cause of the injury, both as alleged and proved, was the untimely hoisting of the cage, and that the jury had found no negligence in that; that the negligence of the defendants in allowing the car track and space around the bottom of the shaft to be out of repair was not the proximate cause of the injury, but only the occasion making it necessary for Thomason to go upon the cage to work, which was properly constructed and equipped and as safe with proper care on his part as such things can be made in a coal shaft.

We are of opinion that these assignments ought to be sustained, and that the District Court erred in refusing to render judgment in favor of the defendants upon the findings of the jury. The sudden and untimely hoisting of the cage was the proximate cause of the injury, and the jury found that the defendants were not guilty of negligence in that act. It matters not, then, how negligent they were or may have been in allowing the car tracks to rot and get out of repair, since such negligence caused no injury to the plaintiff. It is true that if the car track had been in good repair, and therefore on a level with the bottom of the cage, the necessity for Thomason to go onto the cage to pull it up might not have occurred; but he was not hurt by reason of this act. To illustrate: If he had gone upon the cage and took hold of the car as he did, and by reason of the defect in the track, the car had turned over upon him and injured him, then the defect in the track would seem to be the proximate cause of the injury, and if he was free from negligence, it would seem that he might recover on account of the impaired condition of the track. But here there was no injury caused by the condition of the track. If the cage had not been hoisted, he had not been injured; hence it is clear that an intervening cause, the hoisting of the cage, produced the injury, and the jury having found no negligence in that act, it becames, in law, one of those unfortunate accidents the risk of which is ordinarily incident to the employment and is assumed by the employe.

We therefore conclude that it is our duty to reverse the judgment appealed from and to render such judgment on the verdict as the District Court should have rendered, and that is, that the plaintiffs take nothing by their suit, and that the defendants go hence without day and recover all their costs in this behalf expended, both in this court and in the court below.

Reversed and rendered.

BYRON HOOVER ET AL. v. JOSEPH C. KEARBEY.

Decided January 19, 1901.

1.—Assignments of Error.

Where the record does not show any assignments of error filed, none will be considered, although appellant's brief purports to set forth assignments taken apparently from the motion for new trial.

2.—Appeal—Cross-Assignments Against Parties Not Appealing.

Where, in an action for land brought by several plaintiffs among whom there is no conflict of interest, some of the plaintiffs recover a part of the land, and defendant has judgment against the others, and these alone appeal, cross-assignments by defendant against the plaintiffs who recovered, defendant not having perfected a cross-appeal, will not be considered.

Appeal from Erath. Tried below before Hon. Lee Young, Special Judge.

Edward W. Roberts, Thos. B. King, and *W. W. Moores,* for appellants.

Martin & George, D. W. Doom, and *D. H. Doom,* for appellee.

STEPHENS, ASSOCIATE JUSTICE.—This suit was brought against the appellee, Joseph C. Kearbey, to recover a tract of land in Erath County, and resulted in a judgment in his favor against all of the plaintiffs except J. D. Neilson, Mrs. Sallie N. Coleman, and Samuel P. Black, who recovered and undivided one-third of said tract of land, except three acres and one-twentieth of an acre described in the judgment. From the judgment against them the plaintiffs other than J. D. Neilson, Mrs. Sallie N. Coleman, and Samuel P. Black, perfected an appeal to this court, but filed no assignments of error. The brief filed purports to set forth assignments of error taken apparently from the motion for a new trial; but we would not be warranted in considering assignments so made.

The appellee also gave notice of appeal, but without filing any appeal bond, seeks to have us review the judgment rendered in favor of J. D. Neilson, Mrs. Sallie N. Coleman and Samuel P. Black, who, as already seen, did not join in the appeal of their coplaintiffs. We know of no authority for considering appellee's assignments in such case, no appeal having been perfected by him, or by those against whom he seeks relief. The right of an appellee to file cross-assignments of error is well settled. Duran v. Railway, 86 Texas, 287. But where, as in this case, there is no conflict of interest between the plaintiffs in the original action, and some of them recover their proportion of the property sued for, and others do not, and those who are unsuccessful alone appeal from the judgment against them, such appeal does not authorize the defendant, by cross-assignments of error, without any appeal from the judgment in favor of the other parties, to have that judgment reviewed.

It follows from these conclusions that the judgment appealed from

should be affirmed, and that we have no jurisdiction to grant the relief sought by appellee against parties not before the court either as appellants or appellees.

Affirmed.

FRANK BEAN v. E. D. WHITNEY.

Decided January 19, 1901.

Limitation of Five Years—Description in Deed—Conflicting Boundaries.

Where the field notes of a deed, though calling for the line of the original survey of which it purports to convey a fractional part, gives such further description, by established and marked corners, as to the location of such line as affords reasonable notice to the true owner of a strip of land adversely occupied under the deed—and being in fact part of the next adjoining survey—that such line is claimed to be at a different place from that claimed by the owner of such adjoining survey, the deed will suffice to support the five-year statute of limitations.

Appeal from Comanche. Tried below before G. H. McMillan, Esq., Special Judge.

J. P. Graham, for appellant.

Goodson & Boynton, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—The judgment appealed from established the western boundary of the James Hamilton survey No. 92 to be 38 varas east of where appellant claimed it, and 38 varas east of where the calls for distance in the field notes of that survey placed it,—appellee, who was the owner of the E. D. Whitney, a junior survey calling for the Hamilton, recovering the strip of land in dispute from appellant.

The only question to be determined on this appeal is whether or not the court erred in holding the deed from Burks and wife to appellant, made and recorded September 15, 1893, to be insufficient as a basis for the defense of five-years limitation, the deed describing the land conveyed by it as follows: "A parcel of land situated in Comanche County, Texas, patented to James Hamilton October 30, 1845, patent No. 296, Vol. 1, Abst. No. 459, survey No. 92, and being one hundred and six and two-thirds acres out of the West side of said survey No. 92: Beginning 2375 varas North 71 West from the N. E. corner of said survey No. 92, a rock in ground from which a P. O. marked X S 21½ E. 8 1-5 vrs. Sp. O. E. N. 53 1-5 E. 2 9-10 vrs.; thence N. 71 W. 475 vrs. to a rock in ground for N. W. corner said survey No. 92 for N. W. corner this tract a sp. oak mkd 'X' brs. S. 74½ E. 25 4-5 vrs.; thence S. 19 W. 1267 8-10 vrs. to a rock in ground for S. W. corner said survey No. 92 for S. W. corner of this tract a mesquite X N. 61½ E. 92 4-5

vrs.; thence S. 71 E. 475 vrs. to a rock in ground for S. E. corner this tract, from which a double mesquite mkd. X bros. N. 33½ W. 26½ vrs.; thence N. 19 E. 1267 8-10 vrs. to the beginning."

Just before this deed was made the county surveyor ran out and marked on the ground the boundaries as described in the deed, and himself wrote the deed, copying the field notes thus made in it. In accordance with the boundaries so established, which placed the western boundary of the Hamilton survey 38 varas west of where it was established by the judgment, appellant took possession of and fenced the land, holding adverse possession and paying all taxes thereon, as testified by him (without objection) for the full period of five years before the institution of this suit.

Counsel for appellee endeavor to sustain the action of the court with the proposition that: "As appellant claimed under a deed from B. M. Burks which described his land as being a part of and out of the James Hamilton survey No. 92, and the jury having found the disputed strip to be a part of the E. D. Whitney survey, and not a part of said Hamilton survey, the five years statute would have no application, as appellant would not have been in possession of the same under any deed describing the land, because his deed described the land that he claimed as out of the Hamilton and not out of the Whitney survey."

In this we would have no trouble in agreeing with counsel for appellee if the deed in question had contained no other description of the western boundary of the Hamilton survey than such as was found in the field notes of that survey, there being ample authority for so holding. Day v. Needham, 2 Texas Civ. App., 680; McDonald v. Hamblin, 78 Texas, 628; Udell v. Peak, 70 Texas, 549; McCurdy v. Lockard, and McCurdy v. Bullock, 2 Texas Civ. App., 220, 223. But inasmuch as the deed to appellant, by calling for a well-defined boundary marked on the ground different from that described in the Hamilton patent, except as to the calls for distance, clearly placed the western boundary of the Hamilton survey beyond its true location according to the original field notes, we think the case at bar is distinguishable from those above cited, and that the case of Jones v. Andrews, 62 Texas, 667, is authority for holding that the court was in error in treating the deed in question as being incompetent to support the defense of five years limitation. In that case one of the defendants, Burleson, interposed the statute of five years limitations as a defense to the action of the plaintiffs, who sought to recover the Hunt survey, and a charge was held to be erroneous which instructed the jury to disregard that defense because the deeds under which Burleson undertook to prescribe called for and recognized the lines of the Hunt survey. In the course of the opinion this language was used, which seems to be pertinent here: "Burleson's claim under a call for the Hunt survey does not imply the recognition of any line which may be claimed for it by those who own it, but rather it is but the recognition of its existence according to the lines of his own title calling for it, and consistent with his claim as to where that boundary

line is with reference to the land possessed by him under his title." So, appellant's claim under calls for the western boundary of the Hamilton survey did not imply the recognition of any line which may be claimed for it by those adversely interested, but rather it is but the recognition of its existence according to the marked lines of his own deed calling for it, and consistent with his claim as to where that boundary line is with reference to the land possessed by him under his deed.

But whether the case of Jones v. Andrews is in all respects analogous to the case at bar or not, we are still of opinion that the decision in that case recognizes a sound principle, which is: If the field notes of a deed, though calling for the line of another survey, give such further description as to its location on the ground as affords reasonable notice to the true owner of the land adversely occupied that such line is claimed to be at a different place from that claimed by him, the description is sufficient as a basis for the defense of five years limitation. The field notes of the deed in question, unaided by extrinsic facts, clearly embraced the land adversely occupied by appellant, and the appellee was required to take notice of that fact.

Whether or not the taxes were assessed and collected in such manner as to meet the requirements of the five years statute is a question not presented by this record, but the very nature of the case suggests it, and in view of another trial we call attention to the case of Dutton v. Thompson, 85 Texas, 115.

For the error indicated the judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

WESTERN UNION TELEGRAPH COMPANY v. G. W. BRYSON.

Decided January 19, 1901.

1.—Telegraphs—Death Message—Delay in Delivery—Excuse for Recipient's Failure to Act Promptly.

Plaintiff sued for damages for delay in delivering a message announcing the serious illness of his brother, whereby he was prevented from being at the funeral. Had he taken the first train after receiving the delayed message, he would still have arrived in time for the funeral, but he failed to take such first train because of his son's sickness, the condition of his business, and other circumstances. See the opinion for facts held to warrant the court in refusing to direct a verdict for the defendant, and in submitting to the jury the issue as to whether there was a sufficient excuse for plaintiff's failure to act promptly in starting.

2.—Same—Charge.

In submitting the issue as to whether there was a sufficient excuse shown for plaintiff's failure to take the first train, the court charged the jury: "If you believe from the evidence that a reasonably diligent and prudent man, possessed of the same information that plaintiff had, and similarly situated and circumstanced as plaintiff was, as shown from all of the evidence before you, would have started to his brother on the train that passed C. at 2:30 o'clock of that

day, then the plaintiff will be precluded from a recovery." Held, that the charge was all that was required.

3.—Same—Same.

The court properly refused to charge that defendant was not liable if, by a reasonable expenditure of money, plaintiff could have lessened or prevented the injury, since plaintiff's excuse for delay involved more than an expenditure of money.

4.—Same—Office Hours.

Evidence that the telegraph office was kept open until 12 o'clock at night, and no regular office hours had been fixed, though it was the usual custom to keep such office open from 8 a. m. to 6 p. m., authorized the submission to the jury of the question as to what were defendant's office hours.

5.—Same—Charge of Court—Submission of Issue.

Where the appellant company requested a charge exonerating it from liability if the message was received after its reasonable office hours, it can not object to the submission to the jury of the question whether such office hours were reasonable.

6.—Assignment of Error—Brief.

An assignment of error to the sufficiency of the evidence will not be considered where it relates to diverse issues which are grouped in the assignment, and no one of them is separately briefed.

Appeal from Cooke. Tried below before Hon. B. E. Barrett.

Wilkins, Vinson & Batsell and *George H. Fearons,* for appellant.

J. T. Adams, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—Action for damages resulting from delay in the transmission and delivery of a death message. The objections urged to the first, second, and third assignments of error, for not being briefed as required by the rules, under repeated rulings we must sustain.

The fourth, fifth, and ninth assignments raise in different forms the important question in the case, which is, in effect, whether or not the court should have instructed a verdict against appellee upon the ground that, to quote from one of the assignments, "the uncontradicted testimony showed that said message was transmitted to Chickasha and delivered to Jack Ware, and to plaintiff himself in time for plaintiff to have gone to Centralia and reached his brother before his burial, if the plaintiff had availed himself of the ordinary means of travel open to him," the case being one in which appellee was given a verdict for being deprived of attending his brother's funeral in consequence of the failure of appellant to promptly deliver to Jack Ware, at Chickasha, I. T., a message sent from Centralia, Mo., to Gainesville, Texas, and forwarded to Chickasha addressed to appellee in care of Jack Ware, announcing that appellee's brother was not expected to live. The message was received at Chickasha a little after 7 o'clock p. m., August 29, 1899, but was not delivered to Jack Ware until a little after 8 o'clock the next morning. Appellee, whose home was at Gainesville, but who had a ranch and was engaged in feeding cattle about ten miles from Chickasha, came to town

that morning and received the message about 11 o'clock. By taking a train which left Chickasha that afternoon at 2:30 he could have gone to Centralia, Mo., in time for the funeral of his brother.

We must therefore determine whether the excuse offered for not taking that train was such as to warrant the court in withdrawing the case from the jury, for it has been held in this State that such an issue is ordinarily one for the jury. Telegraph Co. v. Lydon, 82 Texas, 364; Telegraph Co. v. Terrell, 10 Texas Civ. App., 60; Elliott v. Telegraph Co., 7 Texas Civ. App., 482. It is, however, insisted that in this instance the excuse was so clearly insufficient as to bring it within the rule applied in Telegraph Company v. Birchfield, 14 Texas Civil Appeals, 664, and there is much force in the contention.

Appellee testified: "That on the morning of August 30, 1899, he went from his ranch to Chickasha and arrived there about 11 o'clock that morning; that Mr. Ware told him about the message, and he went to the depot and saw a copy of it; that the message was sent to Chickasha in care of Jack Ware, who was the plaintiff's groceryman; that the depot was 75 or 100 yards from the store of Ware; that when he, plaintiff, received the message, he sent a message to his nephew at Centralia that he would start on the first train; that he was in town that morning, and had come to get some medicine for his son who was sick, and was in his shirt sleeves and overalls, and that he went back to the ranch to deliver the medicine and to change his clothes, and give instructions about business; that his son was sick and nobody was in charge of the ranch; that he had hands working on the ranch; that he did not know that his brother was sick, but that he knew that his general health was bad; that after receiving the message he went back to the ranch and fixed up some matters hastily and returned to Chickasha and took the night train at 2 o'clock on the morning of August 31, 1899; that he went from Chickasha to Kansas City and from there to Centralia, arriving there about 10 o'clock p. m., August 31st. That when he got there his brother was dead; that he died at about 4 o'clock on the evening of August the 30th." He further testified on cross-examination: "That it was prairie country between his ranch and Chickasha, and that they had a pretty good country road all the way during August, 1899; that at the time he was worth as much as $10,000, and could have bought a suit of clothes; that he had money on hands to answer his needs, and had credit; that his sick son was 23 years of age and lived on his ranch; was married and keeping house, and was assisting plaintiff in managing his business at the ranch; that when he (the witness) was away, his son would take charge; that his son's wife was well, and that his son was not under the treatment of a doctor; that he had bilious fever, and had been to the doctor, and had been there for medicine; that his son had been sick for a couple of weeks, but was getting better, but was not up; that he had hands on his place; that he went back home after receiving the message to take some medicine to his son and change his clothes and give instructions as to his business; that he was able to buy a suit of

clothes, and that he could have hired some one to take the medicine out to his son; that he could have sent word out to his men by the messenger, giving them instructions about managing his affairs until he could return, but that it would have been a bunglesome way to do it; that after he received the message, he could have hired a team at a cost of about two dollars and driven out to his ranch and on the way thought of what instructions he wanted to leave; that he knew that a train left Chickasha on the evening of August 30, 1899, at 2:30 bound for Centralia; that after he received the message at 11 o'clock on the morning of August 30, 1899, he did not know whether his brother was dead or alive, and that he knew that it had been sent the evening before, and stated that his brother was not expected to live; that if he had gone on the 2:30 train on the evening of August 30, 1899, he would have arrived in Centralia about (12) noon the next day, August 31, 1899; that his brother was buried about 5 o'clock on the evening of August 31, 1899; that had the message been delivered to Mr. Ware by 8 o'clock of the 29th of August, he, plaintiff, could and would have arrived in Centralia the evening of the 30th, which would have been twenty-four hours earlier than he did arrive there, and about eighteen hours before his brother's funeral."

It was admitted that if the message had been promptly delivered he could not have reached his brother before his death. He further testified that no reply was received from the message: "Wire me this evening this place; I start to-night," which he sent to Centralia a little after 11 o'clock; that he waited nearly an hour for a reply before he started back to the ranch; that he had cattle feeding at three different places, and that his son was not able to give them attention; that he could not have given instructions as to their management in writing satisfactory to himself.

The issue was thus submitted in the charge: "Now, if you believe from the evidence that a reasonably diligent and prudent man, possessed of the same information that plaintiff had, and similarly situated and circumstanced as plaintiff was, as shown from all the evidence before you, would have started to his brother on the train that passed through Chickasha about 2:30 o'clock p. m. of that day, then the plaintiff will be precluded from a recovery."

Having set out the evidence constituting the basis of this charge, we need not discuss it further than to say that we can not quite assent to the proposition that it showed conclusively that the conduct of appellee in waiting for the night train was wholly inexcusable; there being a combination of circumstances apparently constraining such postponement of his journey, and a moral impossibility being equivalent to a physical one in cases of this kind, and what a person of ordinary prudence and diligence would have done under like circumstances being peculiarly a question for the jury. If the evidence *tended* to show a reasonable excuse for the failure to take the first train, and we think it did, it was the duty of the court to submit the issue to the jury. We are

not required by these assignments to consider the sufficiency of the evidence to sustain the finding that the excuse was reasonable, but only whether or not the issue was raised by the testimony.

The twelfth and thirteenth assignments complain of the court's refusal to charge the jury to find for appellant, if by a reasonable expenditure of money appellee could have lessened or prevented the injury, but we hardly think the principle thus invoked was applicable to the facts of this case. Something more than expenditure of money was involved in the excuse for the delay, and the requested charges, if given, would have taken this from the jury. The charge above quoted was all that was required.

The sixth and seventh assignments complain of the charges submitting the defense of office hours for delivering telegrams at Chickasha. It is first insisted that the evidence established beyond question the existence of such office hours from 8 a. m. to 6 p. m., and consequently that the court erred in submitting that as a controverted issue of fact to the jury. But we do not so interpret the record. The telegraph office at Chickasha was kept with the railroad office, and the call boys in the service of the railroad company, it seems, also delivered messages for the telegraph company; and while the evidence tended to prove that they were not required to do so after 6 o'clock, the operator testifying that the messenger boy employed by him went off duty at that hour, it also tended to prove that they often did so. The telegraph office was kept open till 12 o'clock at night, and it seems to have been the duty of operators at such offices as that kept at Chickasha to deliver messages themselves, and the company does not seem to have fixed any delivery hours for them, although there was evidence tending to show hours fixed by custom at such offices from 8 a. m. to 6 p. m., this being left, however, to the discretion of local operators, while at offices of a higher grade the hours were from 8 to 8. We doubt if it can be fairly said that appellant had any established hours for delivering messages at Chickasha, although the operator there testified that it had. At any rate the evidence warranted the submission of the issue to the jury.

It is next insisted that the court erred in submitting the reasonableness of the office hours for delivering messages to the jury. It is perhaps a sufficient answer to this contention to make the following quotation from appellant's third special charge, as an invitation to the court to submit the issue to the jury: "If you believe from the evidence that the defendant company had reasonable office hours during which it delivered telegraphic messages in the town of Chickasha, I. T., it was not by law compelled to deliver messages outside of said hours."

But if this be not a sufficient answer, and it was the duty of the court, as appellant contends, to pass upon the reasonableness of the hours, we are yet not prepared to hold that the result should have been different. From 6 o'clock p. m. till night, according to railroad or even sun time, at Chickasha, I. T., was a long time in August, and must have covered a considerable portion of the business hours of that thrifty business

town of 2500 or 3000 people. The telegraph office was itself kept open for business till long after that time; the operator was there, and could easily have delivered the message, or had it done (as was his duty)—a message which in its very nature prompted diligence in the effort to deliver it, unless the operator was lost to all sense of the common obligations which humanity imposes. We can not escape the conclusion that a clear case of negligence was made out.

The last assignment of error complains of the verdict, but is not so made and briefed as to require us to pass upon the sufficiency of the evidence on any particular issue, since the complaints, which relate to diverse issues, are grouped in the assignment and no one is separately briefed, unless it be that of the excessiveness of the verdict, in which we find no merit.

The judgment is therefore affirmed.

Affirmed.

W. H. BOWERMAN v. R. C. POPE ET AL.

Decided January 26, 1901.

1.—State School Land—Purchase—Appraisement Necessary.

An offer of $1.50 per acre for a tract of State school land appraised at $2 per acre is insufficient, and does not authorize an award of the land by the General Land Commissioner.

2.—Same—Reappraisement—Approval.

Where the Commissioner of the General Land Office approved a reappraisement at $1 per acre of all State school lands in a certain county "which appeared on the market," this did not constitute a reappraisement of a section of such land, a sale of which had been awarded by the Commissioner two days before, although such sale proved invalid because of defects in the application to purchase.

3.—Same—Appraised Value.

An application to purchase, at $1.50 per acre, school land which had been appraised at $2 per acre, is not made valid by the fact that it appeared on the books of the General Land Office without appraisement, and that it was "understood" that lands which were unappraised was on the market at $1.50 per acre, the minimum price fixed in the statute for land of that class.

4.—Same—Forging Date of Application—Issue for Jury.

Where, in a contest as to priority of right in the purchase of State school lands, there was an issue, with conflicting evidence, as to whether the date of plaintiff's application (the older one in point of time) was a forgery or not, it was error for the court to peremptorily instruct a verdict for defendant, instead of submitting that issue to the jury.

Appeal from Hall. Tried below before Hon. G. A. Brown.

J. K. Duke and *W. M. Pardue,* for appellant.

H. E. Hoover and *Plemmons & Veale,* for appellees.

CONNER, CHIEF JUSTICE.—This is a contest between adverse claimants of section 108, block 2, of public free school lands in Hall County,

surveyed by the Texas & Pacific Railway Company. Each party claims said section as "additional" land to his home section; appellant claiming ing the east one-half of section 100 as his home or base section. Appellant claims his said home section under two applications to purchase, one of date August 20, 1897, and one bearing date September 3, 1897. On the latter date appellant also appears to have made application to purchase section 108 in controversy. Appellee Pope claims section 108 as assignee of one J. R. Gracey, and also by virtue of an application to purchase the same by him made on November 22, 1899. The east one-half of section 100 and section 108 were awarded to appellant, who was plaintiff below. After the introduction of the evidence, the court charged the jury that "in this case you will find and say by your verdict that the plaintiff take nothing by this suit." The verdict was so returned, and from the judgment in appellees' favor this appeal has been prosecuted.

In illustrating the conclusion reached by us, it will not be necessary to consider the assignments in their order, nor, indeed, to state all of the facts. We think it sufficient to say that, while appellants' title to his home section appears to be insufficient in so far as dependent on his application of August 20, 1897, he nevertheless shows application, affidavit, obligation, and payment in regular form, bearing date September 3, 1897, which is prior in point of time to the proceedings under which appellees claim. It is insisted that the evidence shows this latter date to be a forgery, the true date being erased. The evidence on this issue was sharply conflicting, and the issue was evidently one for the jury.

Appellant's application to purchase the east one-half section 100 on August 20th was insufficient, in that the evidence shows that this section had been appraised at $2 per acre October 29, 1887, and we think it clear no reappraisement was ever shown to have been made prior to the date of this application. This application, the obligation, and payment were made on the basis of $1.50 per acre. An offer of $1.50 per acre for land appraised at $2 per acre is insufficient, and did not authorize an award. See Gracy v. Hendrix, 93 Texas, 26. The fact that on August 23, 1897, the Commissioner of the General Land Office approved the recommendation of the commissioners and county judge of Hall County classifying the lands described in the list attached to the recommendation as dry grazing lands, and appraising them at the price of $1 per acre, can not be held to be a reappraisement of section 100. The award under the application of August 20th, was made to appellant on August 21, 1897, and said approval of the Commissioner of the General Land Office was adopted only "on all of such lands as appeared on the market." The east one-half of section 100 having been sold on the 21st, as stated, it therefore did not "appear on the market;" the Commissioner having notified the county clerk of Hall County, August 21, 1897, of the award to appellant, and directing said county clerk to insert the name of the purchaser and the date of the sale on the list of unsold land for that county. Nor is the invalidity of appellant's application of August 20th remedied by the fact that section 100 then appeared upon the books of the land of-

fice without appraisement, and that it was "understood" that all land so appearing on the books without appraisement was on the market at $1.50 per acre, in accordance with the minimum price fixed for dry agricultural land by the act taking effect August 20, 1897. Section 100, having been duly appraised at $2 per acre, remained on the market at that price until a reappraisement had been duly made. No such effect can be given the act of the Legislature mentioned, nor an indefinite understanding, by whomsoever entertained. It follows that peremptory charge of the court was correct, so far as it related to the title claimed by appellant under said application of August 20, 1897.

While it is not very clear from the record that appellant's home section has in fact ever been reclassified or reappraised, there appears in the record a certificate of the Commissioner of the General Land Office to the effect that section 100 remains upon the books of that office under the classification of dry grazing land, and appraised at $1 per acre, and that such classification and appraisement is in effect in that office. This, together with the fact that appellant was awarded the land here mentioned under his application bearing date September 3, 1897, tends to show a reappraisement. If this be true, and if appellant's subsequent application to purchase the east one-half of section 100 and section 108 in controversy is prior in time to that of appellees' application, he would be entitled to recover, other essentials concurring. In this condition of the record the issue of forgery appears probably material, and therefore should not have been taken away from the jury by the instruction of the court. Other questions need not be considered, but for the error indicated in the peremptory instruction the judgment is reversed, and cause remanded for a new trial.

Reversed and remanded.

ON REHEARING.

We think appellees have misconstrued our original opinion. We did not find as a fact that the east one-half of section 100 had been reclassified and placed on the market after its original classification and appraisement in 1887, or that appellant acquired title by virtue of his application of date September 3, 1897. We merely adverted to circumstances shown by the record tending to this conclusion, which, in our judgment, rendered it improper for the court to take the case from the jury. We supposed also this case easily distinguishable from the cases of Willoughby v. Townsend, 93 Texas, 80, and Coats v. Bush, 23 Texas Civil Appeals, 139. In the Townsend case it affirmatively appeared that there had been a former sale, and a judicial forfeiture. The former sale had the effect of withdrawing the land from the market, and the court, construing sections 2, 6 and 9 of the Act of 1895, held that Townsend, who was the plaintiff in the action, showed no right of recovery by virtue of application, which had been rejected by the Commissioner,

made after the forfeiture and before the land had been again put on the market in the manner directed in said section 6. The court, inter alia, said that section 2 empowered the Commissioner to make such regulation as had been adopted in that case, and it hence followed that the act of the Commissioner in rejecting the application under consideration was sustained. In the case of Coats v. Bush the point is not directly involved, for we there held that the evidence was sufficient to establish that the Commissioner had reappraised the land and notified the clerk.

In the case now before us, however, the land was duly appraised and classified in 1887, no former sale and forfeiture appearing; both parties hereto made application to purchase; the Commissioner has twice awarded the land to appellant; his purchase has been treated as valid by the officers of the State in the receipt of his obligations and payments of principal and interest; reappraisement at $1 per acre appears on the books of the General Land Office, as stated in the original opinion; and hence, under the circumstances of the case, we were and are now unwilling to hold that as a matter of law the land involved has not been reappraised and was not on the market at the time of the second award to appellant. See Scott v. Blackburn, 47 S. W. Rep., 480.

The motion for rehearing is overruled.

Overruled.

GULF, COLORADO & SANTA FE RAILWAY COMPANY v. G. W. JORDAN & BRO.

Decided January 26, 1901.

1.—Charge on Weight of Evidence—Negligence—Fires Set by Engine.

A charge instructing that for defendant railway company to permit dry and inflammable matter to accumulate and remain upon its right of way would be such negligence upon its part as would make it liable for any damage occasioned by fires through such negligence, was error as being on the weight of evidence.

2.—Same—Prima Facie Negligence—Rebutting—Condition of Engine.

It was not error, nor on the weight of evidence, for the court to charge that, if the fire was caused by sparks from an engine, such fact would prima facie establish negligence on the part of the railway company; but a further clause instructing that, in order to rebut such prima facie case, the defendant company must show to the satisfaction of the jury that the engines were in good condition, was erroneous, as requiring a higher degree of certainty than the law requires.

Appeal from the County Court of Bosque. Tried below before Hon. H. C. Cooke.

J. W. Terry, H. S. Dillard and *B. K. Goree,* for appellant.

Word & Word, for appellees.

HUNTER, ASSOCIATE JUSTICE.—This suit was originally brought

in the Justice Court by appellees against the appellant to recover $196, damages for negligently burning and causing to be burned twenty-eight tons of sorghum hay in stacks in the field through which the railroad was located, alleged to be worth $7 per ton. The defense was a general denial.

Judgment was rendered for plaintiff in the Justice Court for $196. The company appealed to the County Court, where the case was tried by a jury, and judgment again went against it, but for $165 only. From that judgment this appeal is taken.

On the trial the court, among other things, charged the jury as follows: "You are also instructed that to permit dry and inflammable matter to accumulate and to remain upon its right of way, would be such negligence on defendant's part as would make defendant liable for any damage occasioned by such negligence." It is objected that this was a charge upon the weight of the evidence, and this assignment we sustain.

The third assignment complains of the charge of the court as being on the weight of the evidence, wherein the court instructs the jury that if the fire was caused by sparks from the engine such fact would, prima facie, establish negligence. This objection is not good, as has often been held in this kind of case. But there is a reversible error in the latter part of this paragraph of the charge which is not pointed out by appellant's counsel, but in view of another trial we think it not improper to call the court's attention to it, and that is in requiring the defendant, in order to rebut this prima facie case of negligence, to "show to the satisfaction of the jury that the engines were in good condition," etc. This is requiring a higher degree of certainty than the law requires. Moore v. Stone, 36 S. W. Rep., 909, and cases there cited.

We find no other errors in the charge nor in the proceedings otherwise. We will not pass upon the complaint that the evidence did not sustain the verdict as to the large or third stack of hay, as the same question may not arise on another trial.

The judgment of the County Court is reversed and the cause remanded.

Reversed and remanded.

ROBERT RANKEN v. W. C. McCALLUM ET AL.

Decided January 26, 1901.

1.—Municipal Corporation—Succession—Indebtedness.

A municipal corporation which succeeds another and embraces substantially the same territorial body of inhabitants becomes, by operation of law, responsible for the debts, such as sewerage bonds, of its predecessor, although such predecessor was only a de facto corporation, and was abolished by judicial decree because of the irregular manner of its organization.

2.—Same—Commissioners Court—Mandamus—Taxation—City Bonds.

Since the Constitution (article 5, section 18) limits the powers of the commissioners court to county business, article 616 of the Revised Statutes, empower-

ing it to levy and collect taxes to settle the indebtedness of a municipal corporation which has been abolished, is invalid. Following Electric Light Company v. Kenan, 88 Texas, 197.

Error from Mitchell. Tried below before Hon. Ben. Randalls, Special Judge.

Thos. K. Skinker and *A. H. Kirby,* for plaintiff in error.

W. B. Crockett, for defendants in error.

HUNTER, ASSOCIATE JUSTICE.—This suit was filed in the District Court of Mitchell County on the 30th day of September, 1897, by appellant against the Commissioners Court of said county, and against J. E. Hooper, the county judge, and A. J. Coe, J. W. Bird, R. H. Crump, and H. C. Landers, commissioners of and for precincts Nos. 1, 2, 3 and 4, respectively, in the order named, of Mitchell County, said named county judge and commissioners forming the present Commissioners Court of said county, praying for a peremptory writ of mandamus against said Commissioners Court, as a body, and against Hooper, Coe, Bird, and Crump as commissioners, compelling the said court, or said commissioners, to levy and collect a tax on the property situated within that portion of Mitchell County which once formed the incorporated city of Colorado, but now defunct, it having by a vote of the people surrendered its charter as is provided by articles 617b and 617c of our Revised Statutes.

The Commissioners Court in a body and each of said commissioners, answered by a general demurrer, which was sustained by the court, and the petition was dismissed, and from this judgment this appeal is taken.

The petition alleged, in effect: "That prior to the 3d day of July, 1883, the town of Colorado, in said Mitchell County, had been duly incorporated under the general statutes made and provided in that behalf; and that on that day, said town containing more than 1000 inhabitants, the county judge of Mitchell County made and entered on the minutes of the Commissioners Court of said county an order setting forth that the inhabitants of the town of Colorado were then and there and thereby incorporated into a city to be designated and known as "The City of Colorado," and that its territorial limits should be the same as the town. Said judge also made an order for an election for a mayor, a marshal, and five aldermen to be elected in said territory, which election was held in due form, and said officers were elected by the people, qualified and actually entered upon their respective duties as prescribed by the statute, and from July 3, 1883, to May 15, 1890, the said "The City of Colorado" exercised all the powers of an incorporated city of more than 1000 inhabitants within the territorial limits of said town. That on the 1st day of October, 1883, the said city of Colorado issued its bonds in due form to the amount of $6000, for the purpose of build-

ing sewers and draining the city. Said bonds were payable to bearer at the city treasurer's office in the city of Colorado, but interest coupons were payable at the National Bank of Commerce in the city of New York.

At the time of the issuance of said bonds due provisions were made for the payment of the interest and creation of a sinking fund, by an ordinance passed by the city council, in accordance with the requirements of the law; the bonds were afterwards placed upon the market, and before maturity thereof and before the maturity of any of the coupons sued on, and in due course of trade for a valuable consideration paid, the plaintiff became the owner and bearer thereof; that at the time said bonds were issued the taxable values of said city amounted to $1,000,000; that the proceeds of said bonds were used by said city in constructing a drainage and sewerage system for and in said city. In August, 1889, quo warranto proceedings were instituted by the State to declare the city incorporation null and void, and it resulted in a judgment annulling the city corporation and declaring it void, and this judgment was affirmed by the Supreme Court of Texas, who declared that the town of Colorado, as organized in 1882, was still in existence, with its original territorial limits.

All the lands which were ever actually occupied and inhabited lay within the limits of this original town, and all the streets and public buildings, as well as the entire system of drainage and sewerage built with the proceeds of the bonds, were within the same territory. After the affirmance of this judgment, to wit, on the 13th of May, 1890, an election was held by the people for the town officers, and they were elected and qualified and entered upon the duties of their respective offices, and the town begun business again under its old charter and exercising jurisdiction over the same territory. This continued until the 2d of July, 1891, when, by a two-thirds vote of the town council, the town surrendered its charter as such, and accepted in lieu thereof the provisions of title 17 of the Revised Statutes of Texas, and thereupon became duly incorporated as the city of Colorado, embracing the same territory as the town.

When the town revived its municipal government in 1890 it assumed control and ownership of all the property which had belonged to the city created in 1883, and thereafter continued to control and manage the same until the new city was created in 1891, when the latter assumed control and ownership of all the property of the town, and retained the same until the 7th day of August, 1895. On that day the county judge, by an order entered of record, declared the city corporation abolished in pursuance of a vote of the inhabitants taken on the 5th day of the same month, as provided by chapter 109 of the Acts of 1895. Thereupon the city ceased to exist, and no reincorporation has ever taken place. The Commissioners Court of Mitchell County forthwith took charge of all the property of the city of Colorado, and assumed control and management of its unsettled affairs, but has never paid

or made any provision for the payment of plaintiff's bonds, but, though requested, has refused to do so.

Plaintiff claims that the town of Colorado was the successor in law of the first city of Colorado; that the second city was the successor of the town; that each corporation in turn became liable for the debts of its predecessor, including plaintiff's bonds; that since the abolition of the last city, plaintiff has had no remedy against any person, except by mandamus proceedings against the Commissioners Court and the members thereof, to compel them to levy the tax on the taxable property within the limits of the last city, the proceeds of which should be used to pay the plaintiff's bonds.

The first proposition of appellant is: "The last city of Colorado was responsible for the bonds issued by the de facto city of 1883, and when the last city was abolished in 1895, the bonds remained and constituted a continuing liability."

It seems to be well settled that when one municipal corporation is succeeded by another, embracing substantially the same territorial body of inhabitants, the successor, by operation of law, becomes responsible for all the debts of the predecessor. This is the rule, it seems, whether the first corporation is abolished by voluntary surrender of its charter, by legislative repeal, by judicial decree, by merger, or by annexation. Broughton v. Pensacola, 93 U. S., 266; Mt. Pleasant v. Beckwith, 100 U. S., 514; Mobile v. Watson, 116 U. S., 289; Riley v. Garfield Township, 54 Kan., 463; School District v. State, 29 Kan., 57; Ruohs v. Athens, 91 Tenn., 20; Hill v. Kahoka, 35 Fed. Rep., 32; Brewis v. Duluth, 13 Fed. Rep., 334; Laird v. De Soto, 22 Fed. Rep., 421; Devereaux v. Brownsville, 29 Fed. Rep., 742; O'Connor v. Memphis, 6 Lea., 730; Amy v. Selma, 77 Ala., 103; Schriber v. Langlale, 66 Wis., 629; People v. Board of Supervisors, 94 N. Y., 263; Ross v. Wimberly, 60 Miss., 345; 1 Dill. Mun. Corp., 4 ed., secs. 169-174; Tied. on Mun. Corp., secs. 42, 43.

In the case of Shapleigh v. San Angelo, 167 United States, 640, Justice Shiras, for the Supreme Court of the United States, said: "The conclusions reached by this court may be thus expressed: The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights and subject to its liabilities"—citing 1 Dillon, Municipal Corporations, fourth edition, section 172.

We conclude, then, that the city corporation of 1883, which issued the bonds, was a de facto corporation, and that the bonds were valid

obligations of that corporation, and that the town and succeeding city corporations must, in law, be held to have assumed their payment inasmuch as they succeeded to all the property rights of said corporations. White v. City of Quanah, 27 S. W. Rep., 839, and authorities there cited by Justice Head; Shapleigh v. San Angelo, 167 U. S., 646, 42 L. Ed., 310; Brownwood v. Noel, 43 S. W. Rep., 890.

This case is distinguishable from that of Norton v. Shelby County, 118 United States, 425, 30 Lawyers' Edition, 178, in that the persons issuing the bonds in the Shelby County case were held to be neither de jure nor de facto officers, there being under the Constitution of Tennessee no such office to fill; but in this case the municipal corporation which issued the bonds, while not a de jure corporation, because it was not organized according to law, yet, there being a valid statute authorizing the organization of such a corporation, the officers elected by the people acting in that capacity, and who were actually exercising the functions of officers of such corporation, would be de facto officers, and their acts in issuing the bonds would be acts of the de facto corporation, and would be valid; for none can question the validity of such a corporation except the State. Graham v. Greenville, 67 Texas, 62.

The next question is whether the Commissioners Court can be required to levy a tax on the property contained in the territory lately occupied by the city of Colorado, to pay the bonds? Our constitution provides: "The county commissioners so chosen, with the county judge as presiding officer, shall compose the county commissioners court, which shall exercise such powers and jurisdiction over all county business as is conferred by this Constitution and the laws of this state, or as may be hereafter prescribed." Art. 5, sec. 18.

Our statute (articles 615, 617b, 617c) provides a way for towns and cities to abolish their corporate existence, and articles 616 provides that where the corporation is thus abolished, or where any de facto corporation shall be declared void by any court, etc., "all the property belonging thereto shall be turned over to the county treasurer of the county, and the commissioners court of the county shall provide for the sale and disposition of the same, and for the settlement of the debts due by the corporation, and shall carry out and enforce all legal contracts of such corporation, and for this purpose shall have power to levy and collect a tax from the inhabitants of said town or village in the same manner as the said corporation would be entitled to under the provisions of this chapter," etc.

This article also applies, if valid at all, to city corporations such as we have under consideration, though only the terms "town or village" are used above, because the articles 617b and 617c, referred to in the article, relate to city corporations.

From these articles of the statute it seems to us the Legislature intended to provide for just such a condition of affairs as is shown in plaintiff's petition, and give a simple and adequate remedy to creditors of the defunct corporation for the collection of their debts. But in

Electric Light Company v. Kenan, 88 Texas, 197, our Supreme Court held that article 616 was in contravention of the section of the Constitution quoted, in that it attempted to confer jurisdiction on the commissioners court in matters which were not "county business." While, as stated, we easily distinguished the case at bar from the case of Norton v. Shelby County on the question of the validity of the bonds, we are unable to distinguish it from the Texas case above cited on the question of the power or duty of the commissioners court to levy the tax to pay the bonds. Appellant's counsel, both in oral argument and in a very able brief, insist that the construction placed by our Supreme Court upon the terms "county business," as used in the Constitution, is too restrictive, and urge us to reconsider the question, because, as they insist, the question was neither argued nor briefed by counsel on either side before that court in the Kenan case, and hence the court was deprived of the advantages which thorough research and argument of counsel afford; and they cite many authorities both under our statutes and decisions and those of other States. But, while we would be inclined to follow the views expressed by counsel were it not for this decision, we do not feel justified in ignoring it, as it decides the very question at issue here, and one, too, which was certified from this court.

Feeling constrained by the decision in the case named, we order that the judgment in this case be affirmed.

Affirmed.

Writ of error refused.

G. F. WYATT v. BOB LYONS ET AL.

Decided January 26, 1901.

1.—State School Land—Actual Bona Fide Settlement—Issue for Jury.

Where the evidence showed that plaintiff and defendant, who had been contesting applicants for the purchase of certain State school lands, were both young unmarried men, each having a place of abode elsewhere, and that neither made any very substantial improvements, or remained any considerable time on the lands, or otherwise exhibited an unmistakable purpose to establish a home there, the issue of actual, bona fide settlement should have been submitted to the jury, instead of a peremptory instruction to find for defendant.

2.—Same—Collusion in Purchase.

Where, in such case, the evidence tended to show that the purchase of school land made by one of the litigating applicants was made in collusion with a third person and for the latter's benefit, in violation of the statute, and the question of collusion vel non turned on such applicant's good faith in making an agreement to lease the land to the third party, the issue of collusion was for the jury, as a phase of the issue of good faith and bona fide settlement.

3.—Same—Hearsay Evidence—Collusion.

The issue of good faith and collusion being for the jury, it was error for the court to permit a witness to testify that one T., with whom it was charged plaintiff was acting in collusion, had told him, plaintiff not being present, that he, said T., had to get plaintiff to file on the land to keep others from getting it.

4.—Assignments of Error—Grouping in Brief.

Even if an assignment of error as to the admission of evidence must be dis-

regarded because grouped in the brief with other assignments complaining of the court's action in directing a verdict, this would not preclude consideration of the latter assignments.

Appeal from Baylor. Tried below before Hon. S. I. Newton.

Dalton & Brittain, for appellant.

Glasgow & Kenan and *Theodore Mack,* for appellee.

STEPHENS, ASSOCIATE JUSTICE.—This controversy arose over sections 46 and 54 of school land in Knox County. On May 24, 1898, Bob Lyons made application to purchase section 54 as his home section, and 46 as additional land, and both were awarded to him three days later by the Commissioner of the General Land Office. In October following he sold the same to appellee H. T. Harrold. On May 25, 1898, appellant made application to purchase section It as his home section, and sections 46 and 54 as additional lands, but his application as to the additional lands, the sections in controversy, was rejected by the Commissioner of the Land Office the next day after, and because of the award to Bob Lyons on a prior application. This suit was consequently instituted by appellant, and resulted in a verdict and judgment against him, the court instructing the jury to so find.

The controverted issues were (1) whether or not Bob Lyons was an actual settler upon section 54 when he made his application to purchase; and (2) whether or not, if he was not, appellant was an actual settler upon and bona fide purchaser of section 10 at the date of his application to purchase. Upon both of which issues appellant had the burden of proof.

A careful examination of the statement of facts leads us to the conclusion that the evidence failed to show such character of settlement on the part of either Bob Lyons or appellant as to warrant the court in withdrawing these issues of fact from the jury. Both were young, unmarried men, each having a place of abode elsewhere, and neither of them made any very substantial improvements, or remained any considerable length of time on his home section, or otherwise exhibited an unmistakable purpose to establish a home on it. The issue of actual settlement is peculiarly one for the jury, and the case ought to be a very clear one to authorize the court to withdraw it from them. Borchers v. Meade, 17 Texas Civ. App., 32.

In support of the court's action it is insisted that it was incumbent on appellant to show that in making his application to purchase he was not acting in collusion with others, and that the evidence on this issue was such as to warrant the court in treating the fact of collusion as undisputedly established. He admitted that he applied for the land in pursuance of an agreement made with one Taylor in behalf of Phil Witherspoon, by the terms of which Witherspoon was to furnish him

the money to make the first payment of principal, and to pay the interest and taxes for five years for the use of the sections during that time for grazing purposes, so far as the same were not needed by appellant for his own use, he having a few horses and one head of cattle of his own. He denied that Witherspoon or any body else was to have any interest otherwise in the land, testifying that this agreement was entered into to enable him to meet his obligations as a purchaser from the State, and that he "filed on the land to get it for himself and not to get grass for Witherspoon." If such was the real nature of the transaction between him and Witherspoon, we are not prepared to hold that it necessarily showed collusion within the meaning of the law providing for the sale of school lands. The purpose of that provision evidently was, especially in view of notorious land transactions which doubtless led to its adoption, to prevent the use of one person's name in the purchase of school lands for another person or corporation, that being forbidden as early as 1881 (Acts 1881, page 121); and it could hardly have been the intention of the Legislature to prohibit a person really seeking to acquire a section of school land for a home, with additional sections as provided in the act, from contracting the use of the land for grazing purposes for a reasonable length of time, so far as it was not required for his own immediate use to enable him to pay for it. But if such was not the real purpose of appellant and not the real nature of the transaction between him and Witherspoon, and they were acting in collusion within the meaning of the law, it was the province of the jury, and not the court, to determine the issue. Appellant's right to acquire additional lands was conditioned upon his being a "bona fide purchaser" of the home section, that is, a purchaser who has actually settled on the land for the purpose of making it his home, and who is not in collusion with others; and under the testimony in this case it was as much the province of the jury to determine one phase of the issue as the other. Both should have been submitted to the jury. Sayles' Civ. Stats., art. 4218f.

Error is asigned to the ruling of the court in permitting a witness to testify that Taylor told him that "they had to make the arrangement to get Wyatt to file on the land to keep others from getting it," the evidence being objected to because it was immaterial, and because appellant was not present. That this ruling was erroneous appellee does not seem to controvert, but treats it as immaterial because appellant failed to make out a prima facie case. To this we can not assent, since the issues tendered by him were issues for the jury, and not exclusively for the court. The further contention that this, with other assignments, should be disregarded because all have been grouped in the brief, if sufficient to prevent consideration of this assignment, must be overruled as to those complaining of the court's action in peremptorily instructing the jury to return a verdict for appellee.

The judgment is therefore reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

Gulf, Colorado & Santa Fe Railway Company v. E. J. Powell.

Decided January 26, 1901.

1.—Railway Company—Negligence—Injury to Switchman.

See evidence held to warrant verdict against the railway company for injury to a switchman by derailment of a switch engine through improper setting of the switch, and resulting from negligent failure of the foreman to observe that the handle bar of the switch was not securely fastened in its proper place.

2.—Master and Servant—Assumed Risk—Contributing Cause.

Where negligence on the part of the foreman contributes, along with the risk assumed by the servant, in causing the injuries to the servant, the master is liable, as injuries so brought about are not among the assumed risks of the servant's employment.

3.—Same—Concurring Negligence of Third Party—Right of Action Over.

The fact that negligence of a third party concurred with that of the master in causing the servant's injuries, would not confer upon the master a right of action against such third party.

4.—Railway Company—Negligence as to Condition of Switch.

A verdict was properly directed in favor of a codefendant company whose track and switch the defendant company was using, where the evidence showed that the derailment of the engine and consequent injury of plaintiff was due to failure of the defendant's employes to properly set the switch, and not to defects in the switch.

Appeal from Tarrant. Tried below before Hon. Irby Dunklin.

J. W. Terry and *West, Smith & Chapman,* for appellant.

Carlock & Gillespie, for appellee.

CONNER, Chief Justice.—We adopt from appellant's brief the following statement of the nature and result of this suit, viz.: "Appellee was injured by the derailment of the tank of a switch engine on which he was serving as switchman. He charges that the accident was due to improper adjustment of the switch, excessive speed, and absence of the fireman from the engine, whose duty it was to keep a lookout. The switch was the property of the Texas & Pacific Railway Company, over whose track the defendant's engine was passing. The defense was based substantially on the propositions that the absence of the fireman did not contribute to the accident; that it was the duty of plaintiff to look out for the switch; and that he was in the best position to perform that duty, and if he could not ascertain its improper adjustment, the defendant could not otherwise be negligent in failing to ascertain it; the speed of the engine was not excessive, and if so, did not contribute to the accident, and that if the speed of the engine was excessive, plaintiff had the power and authority to check it by signaling the engineer, and failing to do so, could not complain that the defendant, by some other agent, had not done so. Appellant made the Texas & Pacific Railway Company a party, and prayed that in the event judgment was rendered against it,

on the ground of any defect in the switch, that it would recover over against the Texas & Pacific. The court charged the jury to find a verdict in favor of the Texas & Pacific Railway Company. There was a verdict and judgment against appellant for the sum of $2500."

The questions made on this appeal arise principally out of the alleged insufficiency of the evidence to support the verdict and judgment, and to authorize the submission of the issues given in charge to the jury. We will not incumber the record by setting out the evidence in full. We think it sufficient to say that after a careful examination of the record, we have been unable to say, in the language of the assignments, that the evidence did not authorize the submission of the several issues given in the charge, or that the motion for new trial should have been granted for want of sufficient evidence to sustain the verdict and judgment in appellee's favor.

Briefly stated, the facts show that the engine in question was backing northward upon a switch track owned by the Texas & Pacific Railway Company to a point beyond the switch at which the derailment occurred. The engine crew proper consisted of a foreman, the engineer and fireman, and the appellee and one Smedley as switchman; that appellee was standing upon the foot board of the tank on the left hand side in the discharge of his duty; that the engineer was also located on the same side going north; that the switch-stand was on the opposite side of the track from the side on which appellee and the engineer were located. The evidence tended to show that it was the special duty of the foreman to see that the switches were all properly lined up, and in position for the safe passage of engines and cars; this also was included among the duties of the appellee as a switchman, and of the fireman. The evidence established the fact that the switch in question was in good order, but tended to show that the handle-bar with which the switch was turned, was, at least partially, out of the notch or "socket," as it is designated in the record, fixed to hold it in place. The evidence we think authorized the finding that the switch-bar had not been securely placed in its position, by reason of which the switch points became displaced and the tender derailed and appellee injured. The fireman was absent from his place of duty on the engine. Had he been in his place and looking, he would have been in better position to have seen whether the switch-bar was secure in its socket than either the engineer or appellee. Switch-stands are provided with what is termed a "target," or piece of tin about 1½ feet each way, one side of which is white and the other side red; in the present instance the white indicated the proper position of the switch for the main line and the red for the side track. The testimony tends to show that these targets during the day serve as the principal indication to engine crews of the condition of switches. The foreman of the crew testified that, in the discharge of his duty, he had gone along the track prior to the passage of the engine for the purpose of seeing that the switches were in position; that he passed along within forty feet of the switch in question; that the target showed white for the

main line (the line sought), and that the switch was secure—but the evidence, we think, warrants the inference that he was negligent in failing to see that the switch-bar was securely fastened. There was also evidence to the effect that the engine was running at a speed of fifteen miles an hour, contrary to an ordinance of the city of Fort Worth, whose jurisdiction extended over the place of the accident, restricting engines and cars to a speed not exceeding six miles an hour. Appellee observed that the switch-target so appeared as to indicate safety; he noticed nothing wrong with the switch or switch-point or handle-bar, but testified that, at the speed at which they were going and in the position in which he was located, he could not well determine whether the bar was securely fastened in its socket. The evidence also authorized the finding that, in the absence of the foreman, which was the case here, the speed of the engine was under the control of the engineer, and that appellee was not required, if indeed authorized, to signal him to slacken the speed unless he saw an obstruction, or had cause to stop to perform some work directed by the foreman.

As stated, we think the evidence tends to show that the handle-bar with which the switch was held in place was but partly or insecurely fixed in the "socket;" that by reason of the rapid approach of the engine the handle-bar, and consequently the switch-points, became displaced, by reason of which the tender was derailed and appellee injured as alleged; that the foreman, whose especial duty it was to see that switches were in condition for the safe passage of cars and engines, was guilty of negligence in failing to discover its condition and securely fasten in its place said handle-bar; and that such negligence of the foreman was a proximate, contributing cause of appellee's injuries.

The evidence on these issues being sufficient in our opinion to support the verdict and judgment in appellee's favor, the motion for new trial was properly overruled, notwithstanding the alleged insufficiency of the evidence on other issues to support such verdict.

We can not say from the evidence that within the knowledge of appellee there was such constant violation of the ordinance regulating the speed of engines as to cast upon him the risk of all injuries resulting therefrom, but if we assume that it was so, we think the negligence of the foreman was at least a contributing cause of the derailment and injury in question, and dangers and injuries so brought about were not among the assumed risks of appellee's service. Railway v. Hannig, 20 Texas Civ. App., 649; Railway v. Cummins, 106 U. S., 700. The jury in effect found that appellee was without contributory negligence in failing to discover the absence of the fireman and in the failure to signal the engineer to abate the speed of the engine, and on the whole we have failed to discover error for which the judgment in appellee's favor should be reversed.

Nor do we find error in the peremptory instruction in favor of the appellee, the Texas & Pacific Railway Company. There was no evidence to support a finding that the switch-points, stand or other connections

were defective, or that said railway company was guilty of negligence in failing to replace the handle-bar securely in its socket, or in failing to discover that the same had not been done. Appellant's agents assumed this duty, and the court limited the plaintiff's right to recover to the negligence of appellant alone. If appellant be guilty of negligence as alleged, and such negligence was a cause of the injury, the concurring negligence of the Texas & Pacific Railway Company, if any, confers upon appellant no right of action. Railway v. Naas, 94 Texas, 255, 59 S. W. Rep., 870.

There appearing no reversible error in the proceedings below, it is ordered that the judgment be in all things affirmed.

Affirmed.

Writ of error refused.

J. H. JONES v. A. F. BOURBONNAIS.

Decided January 26, 1901.

1.—Jurisdiction—Transfer of Case.

Where, by agreement of the parties, a case was transferred for trial to another county under article 1270, Revised Statutes, and the court duly entered its order "that the venue in this case shall be and is hereby changed" to such other county, the latter's jurisdiction attaches, notwithstanding that the agreement provided that all papers then on file in the cause should be transmitted, and when so transmitted the court of such latter county should have jurisdiction, and the clerk of the court had failed up to the time of trial to transmit all the papers as agreed on.

2.—Same—Plea to Jurisdiction Necessary.

The question of the jurisdiction of the latter county, after transfer of the case to it, should have been raised, it seems, by plea therein.

3.—State School Land—Actual Settlement.

See evidence of facts held not to constitute an actual settlement upon State school land, but to show merely an intention to settle thereafter.

4.—Same—Excuse for Failure to Settle.

It is actual settlement in fact that fixes the status of an eligible purchaser of additional State school land, and a good excuse for failure to make such settlement will not suffice in lieu thereof. Rev. Stats., arts. 4218f, 4218i.

Appeal from Lipscomb. Tried below before Hon. B. M. Baker.

H. E. Hoover and *C. Coffee,* for appellant.

W. D. Fisher and *Plemmons & Veale,* for appellee.

CONNER, CHIEF JUSTICE.—This suit was instituted by appellant September 30, 1898, in the District Court of Ochiltree County, to try title and recover of appelle the possession of State school land section 52, block 43, surveyed by the Houston & Texas Central Railway Company, the same being claimed by appellant, Jones, under an award from the Commissioner of the General Land Office, as "additional land" to his

home section, 192, of the same survey. On December 12, 1898, the cause was transferred by agreement to the District Court of Lipscomb County. At the May term, 1900, of the District Court of Lipscomb County, the cause came on for trial before a jury, which, having heard the evidence, returned a verdict for appellee in obedience to a peremptory instruction of the court. From the judgment in appellee's favor, appellant has appealed, assigning error to the action of the court in assuming jurisdiction, in refusing appellant a continuance, in the admission and rejection of evidence, in refusing special charges requested, and in peremptorily instructing the jury as stated. We think a determination of the assignments questioning the jurisdiction of the court and the peremptory charge of the court will dispose of all questions presented on this appeal, and we therefore address ourselves to these questions first.

Article 1270, Revised Statutes, reads: "The court may, upon the written consent of the parties thereto, or their attorney, filed with the papers of the cause by an order entered on the minutes, transfer the same for trial to the court of any other county having jurisdiction of the subject matter of such suit." In accord with this article, the parties to this action, by their respective attorneys, agreed in writing that the venue should be changed from the District Court of Ochiltree County to the District Court of Lipscomb County, which agreement was duly filed, and upon which the court duly ordered the venue changed as agreed upon; said order being duly entered upon the minutes. The agreement, however, provided that all papers then on file in the cause should be transferred and transmitted to the District Court of Hemphill County, and that "* * * when said papers are transferred to the District Court of Lipscomb said cause shall stand for trial in said court, the same as if said court had had original jurisdiction over same, without any further formality or the use of certified copies;" and it is here insisted that the jurisdiction of the District Court of Lipscomb County did not attach, by reason of the fact that the clerk failed to transmit all the papers in the cause as agreed upon. Reading the agreement as a whole, we do not construe it as conditional in any sense. It reads in part: "It is agreed by and between the parties in the above numbered and styled cause that the venue in said cause be changed from the District Court of Ochiltree County, Texas, to the District Court of Lipscomb County, Texas. It is agreed that the venue in this case shall be, and the same is hereby, changed to the District Court of Lipscomb County, Texas."

These sentences are complete within themselves, and not made conditional by the subsequent provision requiring a transmission of the papers. The absence of papers material as evidence or otherwise might constitute sufficient ground for a postponement or continuance of the cause in the District Court in Lipscomb County, but could not defeat the jurisdiction of the court acquired by unconditional order entered upon the minutes of the District Court of Ochiltree County as provided by the statute. To which may be added the further fact that the jurisdiction of the District Court of Lipscomb County was not there questioned by plea

to that effect, appellant merely making formal application for a postponement or continuance in order to procure certain written evidence of the proper classification of his home section, which had been on file, but not transmitted as had been provided in the agreement. We think the assignment involving this question should be overruled.

It remains to be determined whether, under the undisputed facts, the court was authorized in giving the peremptory charge in appellee's favor. One of the prerequisites to the acquisition of "additional lands" under the laws regulating the disposition of our public free school domain is actual settlement upon the home section at the time of the application to purchase such additional lands. Rev. Stats., art. 4218f; Schwarz v. McCall (Texas Sup.), 57 S. W. Rep., 31. The undisputed evidence shows that on January 29, 1898, appellant, in due form, applied to purchase his home section, 192; that on August 17, 1898, he, in due form, made application to purchase section 52, in controversy, as additional to his home section, by virtue of which applications, and other formalities complied with, both sections were awarded to appellant by the Commissioner of the General Land Office. Appellant testified on cross-examination as follows:

"I settled on section 192 on January 29, 1898. All that I did as an evidence of my settlement was to go upon the land and have the lines run. W. Coffee did the surveying. I carried the chain. We had the field notes, started from the corner of another section. I was on the land two or three times before filing. Went on the land and stayed there a while. Was hunting for a home. Got off my horse. Was there two or three hours. Prior to this time we had a ranch in Wheeler County. Held it by lease. We then leased the CC ranch—me and my brother—in Roberts County. I don't know that I settled before I surveyed. I did not build a house, dugout, nor stretch a tent, nor leave a bed nor any cooking utensils on the land. I can not tell of any other act relative to my settlement upon the land, than that I had the line run out on one side of the section. After I filed, I made improvements in the latter part of June. I put a dugout on the land. I was taken sick when I went back to Miami. Was sick until March 1st. I went to Fort Worth to see specialist. Got back to Miami April 1st. Then went to Mobeetie, and brought cattle to Miami to ship. Then came to the CC ranch to receive bunch of horses. From there went to New Mexico to get herd of cattle. Got back middle of June. Rested at ranch several days, and then Jim Turner went with me to help build dugout. 192 is seven miles from ranch. This is the first time I, or any one for me, started dugout on 192. We also built a dam. At this time we dug a place almost two feet deep, about 8x10. We did not cover it then. Don't remember whether we slept there that night or not. Generally carry my bed in the wagon, but don't remember if had it at this time. In the summer I went back, and carried a couple of men with me to help on the dugout. I did not carry any trunk there. Have not got any. I kept some of my clothing at Canadian, some on the ranch, some at Miami, and some on 192.

Never left my clothes on 192 until some time after I got back from New Mexico. I don't remember what furniture I put in the dugout. I put a cook stove there. I first began to use it in the fall. Dugout was about 5½ feet on inside. I stayed on ranch a while after I came back from Mexico, because I had no improvements on my place. Yes; I suppose I could have had improvements built there while I was sick and away from home. I did not have time to put improvements on my place. I never did any work of any kind upon this land until the latter part of June, 1898. All I did was to go on the land, survey one side of it, and file upon it. Never placed any lumber, bedding, or anything on the land whatever until the latter part of June. I never slept in the dugout one night."

On redirect examination he testified: "The reason I did no improvements during the time I mentioned was on account of business, and being taken sick. I took the place in good faith for my home. Had no other home during the time I mention, and acquired no other since. I began to improve this place just as soon as my health and business would permit. During the time of my sickness I was compelled to stay in town, as it was thirty miles to the nearest doctor, and about seven miles to the nearest neighbor. My home is now on that place. I have erected a box house thereon, and have at all times stayed on the place since my health and business would permit. This house was erected on the place in the summer of 1899. On the day I made my application to purchase the land in controversy, and prior thereto, I had erected my dugout on the home section. On the 17th day of August, 1898, the date I applied for section 152, I had erected my dugout on my home section, No. 192." (Plaintiff closed.)

The evidence of appellee, which is uncontradicted, shows that he, together with his family settled upon the section in controversy May 30, 1898, and that they have resided thereon as a home ever since; appellee applying to purchase the same September 30, 1898. Appellee testified: "At the date of my application to purchase this land there was no one residing upon section 192, block 42. I had occasion to pass there often. No improvements of any kind were put there until last of July, 1898. There was a hole dug in the ground about 8x10, about two feet at one end and one and one-half feet at the other. Some time in August afterwards this was covered over, and dugout made five feet deeper. In October a little dam was made where the spring ran down. In November I was there, and saw an old stove in the dugout. Stove had a T joint on it, and one end of it pointed towards a hole in the roof. There was no door, but couple of poles laid up against the opening. I saw evidences that yearlings had been in the dugout. This was on road between my place and my brother's. I never saw Jones on section 192. He did not reside there before I filed my application, on September 30th, nor afterwards, that I have ever known of. I think I would have known it, had he

lived there. In the summer of 1899 he had a little box house put there, and had the men build a little pasture."

A. A. Parsell testified: "First improvements that was put on 192 was in July, 1898. There was made then a little hole, about 9x10, and about eighteen inches or two feet deep. I can't remember the exact date, but it was two months afterwards before the roof was put on. A dirt roof was put on it. At the door it was about four feet high. A man could not stand up in the dugout. There was no furniture or anything in the dugout at this time. Later on I saw an old stove. It had a T joint on it, but was not in condition to put fire into, and had no signs there of habitation. There was an old chuck box in the corner, with nothing in it. No pots, cooking utensils, beds, or anything of the kind. House was open, with no way to close it. This was in the fall of '98. Looked as though yearlings had been staying in the dugout. I saw Jones riding over the range at different times; also at the ranch, loafing around and doing chores. Jones has never resided on 192 since the date of his purchase, to my knowledge; and I have lived near there all the time, and worked the range, and would have known it had he lived there."

We think it clear from this evidence, which was substantially all there was on the subject, that appellant was not an actual settler upon said section 192 at the time of his application to purchase the section in controversy. Nor was he such actual settler upon said home section at the date of his application to purchase it, or within six months thereafter, so as to bring appellant within the operation of the validating act approved May 27, 1899. See Gen. Laws 1899, p. 259. Appellant's acts prior to said times were, at most, acts of preparation for settlement. They were sufficient, perhaps, to evidence an intention to settle upon section 192 as a home, but they fall short of establishing the additional essential of settlement in fact. It may also be true that appellant's sickness and other circumstances furnish reasonable excuse for his failure to make actual settlement, but this was his misfortune. Many persons, doubtless, have from like causes been deterred from making the effort to acquire part of the magnificent domain dedicated to our public free school fund, and offered for sale upon such favorable terms. We must remember, however, that it is actual settlement in fact that fixes the status of an eligible purchaser, and not a sufficient excuse for failing to make such settlement. Such being our conclusion, it follows that other assignments of error become immaterial, and that the court properly instructed the jury to find for appellee. No reversible error appearing, the judgment is affirmed.

Affirmed.

Gulf, Colorado & Santa Fe Railway Company v. F. B. Gray.

Decided January 26, 1901.

1.—Master and Servant—Assumed Risk—Charge.

Where plaintiff, a locomotive fireman, was injured while out on the side of a moving engine for the purpose of placing an oil can, by being crushed against a coal bin that had bulged out too near the track, a charge upon assumed risk was not erroneous in failing to instruct that if plaintiff knew of the dangerous proximity of the coal bin, he assumed the risk and could not recover,—the evidence tending to show that it was not customary, nor was it the fireman's duty to go along the side of the engine in replacing oil cans while the engine was in motion.

2.—Same—Assumed Risk and Contributory Negligence Confused.

It was error, however, to charge, in effect, that if plaintiff knew of the coal bin and its dangerous proximity to the track, such knowledge would not prevent a recovery if he was at the time in the exercise of reasonable care for his own safety, but that such knowledge mght be considered in determining whether he was guilty of contributory negligence—since the charge confused the doctrine of assumed risk and that of contributory negligence, and made the master's right of exemption depend wholly on the general law of contributory negligence.

3.—Same—Same.

If the engine was started towards the bin from a point only about fifty feet distant therefrom, and plaintiff thereafter undertook, by going out on the side of the engine, to replace the can, with knowledge of the bin's dangerous proximity to the track, he assumed the risk, although a reasonably careful and prudent man might have supposed that he could arrange the can and return to the cab in time to avoid the danger.

4.—Same.

But if plaintiff undertook to replace the can while the engine was standing still, and the engineer, without warning and without plaintiff's knowledge, suddenly and swiftly approached the point of danger, and plaintiff was without contributory negligence, he would be entitled to recover, notwithstanding he may have known of the defect in the bin and may have remained in the employment of the master.

Hunter, Associate Justice, dissenting.

Appeal from Tarrant. Tried below before Hon. Irby Dunklin.

J. W. Terry and *West, Smith & Chapman,* for appellant.

Wynne, McCart & Bowlin and *George A. Carden,* for appellee.

CONNER, Chief Justice.—For the purposes of this opinion the following statement taken from the brief of appellant is deemed sufficient:

"While appellee was on the side of an engine tank for the purpose of placing an oil can, he was caught between the side of the moving tank and a coal bin parallel with the track. He based his right to recover on the ground that the coal bin had been permitted to bulge out from its proper position, and that the engineer was guilty of negligence in starting the engine without warning and fast speed. The defense was general denial; that the plaintiff had long since known or ought to have known of the condition of the coal bin, and assumed the risk thereof, and con-

tributory negligence in assuming an unnecessarily dangerous position. The defendant pleaded the defense of assumption of risk and of contributory negligence in separate and distinct paragraphs of its answer. There was a verdict and judgment for the appellee for $10,000. Appellant's motion for a new trial on the same grounds as are now assigned as error, was overruled. This appeal has been prosecuted in due course."

There was evidence tending to show that the "bulge" in the coal bin projected to within 4¼ to 6½ inches from the side of a passing tender or engine tank, on the side of which, while passing, it would be obviously dangerous for a person to remain, that is, there is evidence from which the jury might have so found; that it had been permitted to remain in this condition five or six months, during which time appellee had passed it very frequently; that the engineer on the engine in question and other employes of appellant in and about the yards knew of this condition, although appellee testified that he did not. It was appellee's duty as fireman, among other things, to take from and replace in a box attached to the side of the tender certain oil cans containing supplies of oil with which to oil the engine. Going to and from the cab of the engine to this box it was necessary to take one or more steps beyond the cab upon a projection or projections along the side of the tender, and, while doing so, secure the position with one hand holding to its top. This duty was generally performed, however, at times when the engine was standing still. Appellee testified that on the occasion of the injury, while the engine was standing still, he stepped out in the manner detailed as necessary to replace an oil can, when the engineer suddenly and without warning started the engine along the track passing the coal bin, and with great speed ran the intervening distance, some 50 feet, by reason of which appellee was crushed between said "bulge" and tank and seriously injured. The testimony of the engineer and a switchman or brakeman in the cab at the time, however, tended to show that the speed of the engine was moderate, and that appellee was inside of the cab at the time the same was started, and must have gone along the side of the tender as testified by him between the time of the starting and the time of the injury.

The charge of the court is criticised in the assignments of error, in that it is insisted that the court misdirected the jury on the issue of assumed risk plead by appellant as one of its defenses. We think this criticism can be best illustrated by the following quotation from the tenth and eighth paragraphs of the court's charge:

"10b. If you believe the defendant was guilty of negligence in allowing the bulge in the coal bin testified about, to remain as it was for the length of time it had, and that the plaintiff knew or had theretofore known of the bulge, then, while such knowledge on the part of the plaintiff would not prevent the plaintiff from recovering for an injury, if any, caused thereby, if the plaintiff was at the time in the exercise of reasonable care for his own safety, yet the fact, if it was a fact, that the

plaintiff knew or had known of the bulge in the coal bin, may be considered by the jury, together with the other evidence, and given such weight as you believe it entitled to, if any, in determining whether the plaintiff was guilty of negligence in remaining in the defendant's service, or in doing the acts he did at the time he did, or in conducting himself as he did at the time he was injured."

"8. The plaintiff in accepting employment from the defendant as a locomotive fireman assumed the ordinary risks incident to the nature and character of the business in which he was engaged, that is, the ordinary risks incident to the position as fireman upon an engine of a railway train, and for injury due to or the result of such ordinary risks there can be no recovery. But in assuming such ordinary risks plaintiff did not assume the risk of danger from negligence of the defendant, and did not preclude himself from the right to recover for any injuries, if any, not the result of such ordinary risks, but due to and resulting from negligence, if any, on the part of the defendant railway company, but for such, if any, he could recover; unless the plaintiff was also guilty of negligence which caused or contributed to cause the injury."

It is first insisted that if appellee knew of the bulge in the coal bin and of the danger, or might have known the same by the exercise of ordinary care, and without promise on the part of the employer to remedy the same continued in his employment, as a matter of law he assumed the risk incident to the defective condition named, and can not recover for any injury resulting therefrom. While the rule has been so stated frequently in the authorities, we are not willing to apply it under the peculiar facts of this case. There was evidence tending to show that it was not customary, nor was it appellee's duty, to go along the side of the engine tank in procuring and replacing oil cans as mentioned while the engine was in motion. While in motion, appellee's place of duty was ordinarily within the engine cab, in which situation no danger was to be apprehended by passing along side the defective coal bin; and under such circumstances he should not be held to have necessarily assumed a risk not arising within the scope of his duty. Wood, Mast. and Servt., 2 ed., sec. 327.

The next proposition submitted under the assignment made to the court's charge is that: "Where the defective condition complained of was open and obvious and patent to ordinary observation, the employe was chargeable with notice thereof, and assumed the risk." This proposition is established by abundant authority. We think it apparent from the charges of the court quoted that the doctrine of assumed risk and that of contributory negligence was confused, or rather, perhaps, that the right of the master to exemption from the results of his negligence was made to depend solely upon the general law of contributory negligence. If correct in this conclusion, it follows that there was an affirmative misdirection of the jury as to the law of the case. The jury were instructed, in effect, that if appellee knew of the "bulge" (and if he did, the evidence tended to show that he must have known of its dangerous prox-

imity to the track), then such knowledge would not prevent the appellee from recovering, if he was at the time in the exercise of reasonable care for his own safety, but that such knowledge might be considered with other evidence in determining whether appellee was guilty of contributory negligence as alleged. This view is supported by some of the authorities. Sherman & Redfield, in their work on the Law of Negligence, fourth edition, sections 208, et seq., insist that the rule is "that the exemption of masters from liability to servants, for injuries caused by defects which the servants knew or ought to have known, is founded solely upon the general law of contributory negligence, and therefore that the liability or exemption of a master in such cases must be determined by reference to that law," giving an able review of many authorities. We think, however, by the decisions of this State binding upon us a distinction must be made between the doctrines of assumed risk and contributory negligence. With exception not necessary to be noticed, there are two kinds of risks that an employe is held to assume: (1) those ordinarily arising out of the character of his employment and not induced by negligence on the part of his employer; (2) those risks and dangers that are obvious or known to the employe. In this latter case, however careful and prudent he may be in the performance of his duties, he assumes the risk of any injury resulting from the obvious defect, even though the negligence of the employer may have been the efficient cause of the defect, situation or danger. In these instances the law has given no right of action against the master at all. In cases of contributory negligence, however, the general right of recovery for injuries caused by the negligence of the employer is recognized, and may in fact be said to be comprehended within its very terms, but the contributory negligence of the injured employe is affirmative matter of defense that may be interposed by the master to defeat the operation of the general rule, and to relieve him from the ordinary consequences of his negligence. See Railway v. Bradford, 66 Texas, 732, quoted by the Supreme Court with approval in the case of Crawford v. Railway, 89 Texas, 89; Railway v. Conroy, 83 Texas, 214; Railway v. Somers, 78 Texas, 439; Railway v. Bingle, 9 Texas Civ. App., 322; Railway v. Schwabbe, 1 Texas Civ. App., 573; Green v. Cross and Eddy, 79 Texas, 132; Railway v. Somers, 71 Texas, 700; Railway v. Bryant (by this court), 8 Texas Civ. App., 134; Ely v. Railway, 15 Texas Civ. App., 511 (in which writ of error was refused); Railway v. Hohl, 29 S. W. Rep., 1131.

If, therefore, the jury should find, as there was evidence tending to show, that after the engineer started his engine in the direction of the coal bin in question, appellee undertook to replace the oil can in question with knowledge of the bulge in the coal bin and of its dangerous proximity to the track, he assumed the risk of the injuries resulting therefrom, notwithstanding evidence that tended to show that a reasonably careful and prudent man might have supposed that he could arrange the oil cans and return to the cab in time to avoid the danger. If this evidence be true, appellee must have known that the engine was in mo-

tion,—he is affected with notice of the ordinary operation of the laws of nature, and must have known that it was dangerous to ride on the side of the tank by said bulge in the bin, and if he undertook to perform the duty of replacing the oil can under such circumstances, he must be held to have voluntarily taken the chances.

In view of another trial, we add that the court properly refused special charge No. 1 requested by appellant. If appellee undertook to replace the oil can while the engine was standing still, and the engineer, without warning and without appellee's knowledge, suddenly and swiftly approached the point of danger, as appellee testifies, and appellee was without contributory negligence, then he would be entitled to recover, notwithstanding he may have known of the defect in the bin and may have remained in the employment of the master.

Other assignments need not be noticed, but for the error discussed the judgment below is reversed and the cause remanded.

Reversed and remanded.

ON MOTION FOR REHEARING.

HUNTER, Associate Justice, dissenting.—Upon reargument of this case and upon more mature reflection, I am not satisfied with the conclusion we reached on the original hearing. I have concluded that the grounds upon which we reversed the judgment herein exist more in theory than in fact; and besides, a careful study of the record forces me to the conclusion that we were in error in applying the principles relating to obvious defects to the facts in this case, for two reasons: (1) The defendant did not plead that the defect was obvious, nor request a charge on the subject. Railway v. Renz, 24 Texas Civ. App., 59 S. W. Rep., 280; Railway v. Smith, 57 S. W. Rep., 999; (2) the cause of the injury was not a defect, obvious or otherwise, in any machine, tool or thing with which, or upon which, the plaintiff's duties required him to work, but was an extraneous object over which he had no control, and which, in contemplation of the law, was not before his eyes while performing his duties, but was a dangerous obstruction approximately overhanging the track, which the law requires, and ought to require, the railroad company to furnish to its train crew clear of obstructions, at its peril. Railway v. Kenna, 52 S. W. Rep., 555; Jones v. Shaw, 16 Texas Civ. App., 290; Railway v. Smith, 57 S. W. Rep., 999; Railway v. Mayfield, ante, p. ——, 60 S. W. Rep., 896; Railway v. Hannig, 91 Texas, 351; Crandall v. Railway, 5 Am. and Eng. R. R. Cas., 543; Railway v. Bingle, 91 Texas, 287. In the Bingle case, supra, Chief Justice Gaines so clearly, tersely and fully states in one paragraph the whole law of assumed risks, that I must be pardoned for here copying it:

"The servant, by entering the employment of the master, assumes all the ordinary risks incident to the business, but not those arising from the master's neglect. It is the duty of the master to exercise ordinary care to furnish him a safe place in which to work, safe machinery and appli-

ances, to select careful and skillful coworkers, and, in case of a dangerous and complicated business, to make such reasonable rules for its conduct as may be proper to protect the servants employed therein. The servant has the right to rely upon the assumption that the master has done his duty; but if he becomes apprised that he has not, and learns that the machinery is defective, the place unnecessarily dangerous, or that proper rules are not enforced, he assumes the risk incident to that condition of affairs, unless he informs the master, and the latter promises to correct the evil. In this latter event, so long as he has reasonable grounds to expect, and does expect, that the master will fulfill his promise, he does not, by continuing in the employment, assume the additional risk arising from the master's neglect. If he then be injured by reason of that neglect, he may recover, provided it be found that a man of ordinary prudence, under all the circumstances, would have encountered the danger by continuing in the service. This we understand to be the rule in the English courts. It is the rule in the Supreme Court of the United States, and is supported by the weight of authority."

See also: Railway v. Knox, ante, p. ——, 2 Texas Ct. Rep., 292; Railway v. Cooley (Ky.), 49 S. W. Rep., 340; 12 Am. and Eng. R. R. Cas., 553; Whipple v. Railway, Id., 517; Wood v. Railway, 11 Am. and Eng. R. R. Cas., 525; Shearm. & Redf. on Neg., 4 ed., secs. 208-215.

The main ground, however, upon which we based our reversal of the judgment was that the charge of the court below did not clearly distinguish between the principles of law relating to the defense of assumed risks and those governing the defense of contributory negligence, but confused the same in such manner, as, in a measure, to misdirect the jury and deprive the defendant of the benefits of its plea of assumed risks. I have concluded that the distinctions claimed between the two defenses are more fanciful than real, and that in this we were mistaken and in error, (1) because the charge in fact substantially and fairly presented both defenses, though not as fully perhaps as would have been done had the proper charges been asked; (2) because the grounds that the charges confused the two defenses upon which we partly based our judgment of reversal is not assigned as error. To sustain my views I shall quote from the charge the paragraphs which, according to my construction, submitted the two defenses substantially as pleaded, and also the assignments of error.

It must be borne in mind that the coal bin had been leaning or bulging over the track for five or six months, and that the company, instead of repairing or straightening up the bin, had curved the track around it, but not sufficiently to make it safe to trainmen occupying the position that the appellee was at the time he was injured. So that there can be no question about the culpable negligence of the company, and of its full knowledge of the dangerous condition of the track at this bulge. There is no evidence, except what may be inferred from the condition of the structure itself, that the appellee knew of its condition, or of the danger incident to the performance of his duties as fireman in the condition that

it was, and he denies knowledge thereof; but even if it could be inferred that he knew of the bulge in the bin and that the track had been curved around it, the knowledge that the company had curved the track around the dangerous obstruction in an effort to make it safe, authorized him to assume that it was sufficiently curved to avoid the danger of collision while in any position on the engine which his duty required or permitted him to take. And this very act on the part of the company perhaps lulled him into a sense of security.

The charges on the two issues named are as follows:

"8. The plaintiff, in accepting employment from the defendant as a locomotive fireman, assumed the ordinary risks incident to the nature and character of the business in which he was engaged, that is, the ordinary risks incident to the position of a fireman upon an engine of a railway train; and for any injury due to or the result of such ordinary risks there can be no recovery. But in assuming such ordinary risks plaintiff did not assume the risk of danger from negligence of the defendant, and did not preclude himself from the right of recovery for any injuries, if any, not the result of such ordinary risks, but due to and resulting from negligence, if any, on the part of the defendant railway company; but for such, if any, he could recover, unless the plaintiff was also guilty of negligence which caused or contributed to cause the injuries.

"10. If you believe from the evidence that the defendant was guilty of negligence in having the coal bin testified about in the condition that same was when defendant was injured; or was guilty of negligence in moving the engine testified about at the time and in the manner it was moved at the time the plaintiff was injured, and if you believe plaintiff's injuries were caused by such negligence, if any, on the part of the defendant in either one of the respects named; and do not find that plaintiff was himself guilty of negligence, then it will be your duty to find for the plaintiff.

"a. If you believe from the evidence that the plaintiff was at the time aware of the condition of the coal bin and of its proximity or nearness to the track; or had theretofore been aware of its nearness, and that he was guilty of negligence in remaining in the defendant's service after being so aware of its nearness, then it will be your duty to find for the defendant, or if you believe that the plaintiff, at the time he was injured, if he was injured as alleged, was guilty of negligence in being where he was or in the position or attitude he was at the time, or in conducting himself as he did at the time, and that such negligence, if any, on the part of the plaintiff caused or contributed proximately to cause his injuries, then you will find for the defendant.

"b. If you believe the defendant was guilty of negligence in allowing the bulge in the coal bin testified about to remain as it was for the length of time it had, and that the plaintiff knew or had theretofore known of the bulge, then while such knowledge on the part of the plaintiff would not prevent the plaintiff from recovering for an injury, if any, caused

thereby, if the plaintiff was at the time in the exercise of reasonable care for his own safety, yet the fact, if it was a fact, that he knew or had known of the bulge in the bin may be considered by the jury together with the other evidence, and given such weight as you may believe it entitled to, if any, in determining whether the plaintiff was guilty of negligence in remaining in defendant's service or in doing the acts he did at the time he did or in conducting himself as he did at the time he was injured.

"c. If you do not find that there was negligence on the part of the defendant, nor on the part of the plaintiff, but believe from the evidence that each was in the exercise of reasonable care, but notwithstanding such exercise of care, if it was exercised, the injury was inflicted on plaintiff, then, if such was the case, neither party would be at fault, and the injury to plaintiff would be the result of accident, or the result of assumed risks of danger incident to the character of employment or service in which plaintiff was engaged, and if you so find, there can be no recovery by the plaintiff."

In addition to the foregoing, at the request of defendant, the court gave the following special charges as asked:

"3. If you believe from the evidence that plaintiff was on the outside of the tender before the engine was started, and further believe that the engineer was guilty of negligence in starting the engine while plaintiff was out at the oil box, yet if you believe from the evidence that plaintiff knew of the approach of the engine towards the bin, or could have known of its approach by the use of ordinary care and caution, in time to have gotten from the outside of the tender before it reached the place where he was hurt, and knew the close proximity of said bin and bulge to the track, and knew the danger of remaining on the outside while passing the bin and bulge, and could, by the use of ordinary care, have gotten from the outside of the tender in time to avoid injury, and was guilty of negligence in not doing so, and that such failure contributed to his injury, you will find for the defendant."

"7. If you believe from the evidence that defendant was guilty of negligence in having the bin in the condition it was at the time plaintiff was injured, or was guilty of negligence in moving the engine at the time and in the manner it was moved, and further find that plaintiff was guilty of negligence in being on the outside of the tender at the time and place of the accident, and that the injury was the result of the negligence of both plaintiff and defendant, you will find for the defendant."

Properly analyzed, these paragraphs of the charge simply mean what follows:

8. Plaintiff assumed the ordinary risks incident to the employment, but not any risk growing out of defendant's negligence. For injuries, therefore, caused by defendant's negligence, plaintiff can recover, unless he was also guilty of negligence which caused or contributed to the injury.

10. If defendant was guilty of negligence in allowing the coal bin to

be and remain in a dangerous condition; or in rapidly moving the engine when it did, and plaintiff was not negligent, then find for the plaintiff.

a. If plaintiff knew of the dangerous proximity of the bin to the track, or had known of it, and was negligent in remaining in the company's service; or if he was negligent in going out on or remaining on the tender, or in conducting himself as he did, and such negligence caused or contributed proximately to cause the injury, find for defendant.

b. If the defendant was guilty of negligence in allowing the coal bin to remain out of repair, although plaintiff knew or had known of its condition, yet such knowledge would not prevent him from recovering, if at the time he was injured he was exercising reasonable care. Such knowledge, however, may be taken into consideration by the jury in determining whether the plaintiff was guilty of negligence in remaining in defendant's service, or in going out on or remaining on the tender at the time he did.

c. If neither was guilty of negligence, the injury would be attributed to assumed risk, and plaintiff can not recover.

3. Special. If defendant was negligent in moving the engine while plaintiff was out on the tender, yet if plaintiff knew of the approach of the engine to the bin, or could have known thereof by the use of ordinary care, and knew its close proximity to the track and of the danger of remaining where he was, and by the use of ordinary care could have gotten out of danger and avoided the injury, find for defendant.

7. Special. If defendant was guilty of negligence in allowing the bin to be as it was, and was negligent in moving the engine when and as it did, but plaintiff was guilty of negligence in being on the outside of the tender at the time and place he was, find for defendant.

From this analysis and epitome of the charge, I am rather disposed to concede that it is probably defective under the Texas decisions in not stating to the jury that: "If at the time of the injury he knew of the bulge, and of the danger of remaining on the side of the engine while passing it, and with this knowledge present in his mind he voluntarily went out upon or remained on the side of the tender while passing the bulge, or made no effort to avert the danger when he became aware thereof, if he discovered it in time to avoid it, then he took the risk of injury therefrom, and can not recover." But, however you may state the proposition, it is logically a question of whether the servant was guilty of negligence in taking the risk. See Shearm. & Redf. on Neg., 4 ed., secs. 208-217, and the authorities there cited. But I am clear that the error in the charge, if any at all, is one of omission merely, and of which the appellant can not avail itself in the absence of an assignment complaining of the court's refusal to give a proper and fuller one at the appellant's request.

Following are the grounds of error as assigned. The first complains of the eighth paragraph of the court's charge in these words, as copied from appellant's brief: "The latter part of said charge announces an

incorrect doctrine or principle, in that it excludes from assumed risks those risks which are the result of any negligence on the part of defendant, and which may be fully known and the danger thereof fully known to the plaintiff before the time of the accident." But it does not "exclude" such risks; it only *omits* to embrace them.

The second complains of the first section of the tenth paragraph in these words: "It directed the jury to find for the plaintiff if they believed that the defendant was guilty of negligence in having the coal bin in the condition it was at the time of the accident, and the plaintiff was not guilty of contributory negligence, and ignored the doctrine that, although defendant may have been guilty of negligence in having the coal bin in the condition it was at the time of the accident, and although the plaintiff may have been guilty of contributory negligence, yet, if before the time of the accident, he, the plaintiff, was cognizant of the condition of the coal bin and of the danger attending the operation of an engine along the track where he was injured, and yet continued in defendant's employ, then he assumed the risk of such danger and could not recover." It simply *omitted* to embrace the proposition contended for,—that is all.

The third complains of section "a" of the tenth paragraph of the charge as follows: "Said paragraph does not embody a correct principle of law as applied to the facts of this case, in that it leaves to the jury, if they believe from the evidence that plaintiff knew of the condition of the coal bin, or the danger of its condition, to decide whether or not plaintiff was guilty of contributory negligence in continuing in the employment of defendant after having acquired such knowledge, whereas the true rule is that if he continued in the employment of the defendant after he acquired such knowledge, *or could, with the exercise of ordinary care, have acquired such knowledge,* then he assumed the risk of said condition of the coal bin, and could not recover." Which is not the law, but if it were, the failure to embrace the proposition is only an omission.

The fourth complains of section "b" of the tenth paragraph of the charge, because it informed the jury that if the plaintiff knew of the condition of the coal bin, and of the danger of passing it as he did, yet that would not preclude him from recovering if he was exercising reasonable care for his safety at the time, but the fact of his knowledge might be considered in determining whether he was guilty of contributory negligence in remaining in the service of the company," the law being that if he knew before the time of the accident of the dangerous proximity of the coal bin to the track, or *might by the use of ordinary care have known of such dangers and continued in his employment,* he assumed the risk and could not recover." The clause in italics points out that which is omitted from the paragraph, and the only objection the appellant makes to it. We have held time and again that a trainman assumes only the risks of which he has knowledge, and that he may assume that the master will furnish him a good safe track and one clear of obstructions; and while the law raises the presumption that a servant will and ought to dis-

cover from use, within a reasonable time, the defects in a machine, tool or thing he works with, if open and obvious, yet no such presumption of knowledge can be indulged as to the defects and dangers arising out of extraneous objects and causes. Shearm. & Redf. on Neg., 4 ed., secs. 216, 217.

These are all the assignments and charges upon which we based our opinion of reversal, and it is manifest therefrom that the misdirection and confusion which we thought we found the appellant never found or complained of, and it is equally manifest that the only errors, if any, pointed out to the charge are errors of omission merely, and for these the appellate courts of Texas have refused to reverse judgments ever since our judiciary was organized. I therefore conclude that the judgment of the District Court ought to be affirmed.

Motion overruled.

THIRD DISTRICT, 1901.

T. C. TAYLOR v. L. W. GOODRICH.

Decided February 24, 1897.

1.—Contempt—Criticism on Judicial Action.

Whether libelous criticism of judicial action, published after the final disposition of the case in which it was had, can be punished as contempt of court, questioned but not decided.

2.—Judicial Action—Liability for Damages—Contempt.

District Courts, in proceedings for contempt, exercise a general jurisdiction over a subject committed to them, and hence are acting judicially in determining what facts authorize them to render judgment.

3.—Same.

For the exercise of judicial discretion, when sitting as a court over a subject within its jurisdiction, a judge can not be held lable in damages to one claiming to be injured as the result of the official conduct, whatever his motives.

4.—Same.

The action of a district court in punishing for contempt the author of a libelous criticism upon its proceedings made after their termination, if erroneous in law, was still a judicial act, determining a question within its general jurisdiction which could not render the judge subject to an action for damages.

5.—Contempt—Pardon by Governor.

A proceeding of a court imposing punishment for contempt is not a criminal case in which, by the Constitution and statutes, the Governor of the State has power to pardon.

Appeal from McLennan. Tried below before Hon. Sam. R. Scott. [This case was designated as one to be reported, but was inadvertently omitted from the proper volume.]

Baker & Campbell, for appellant.

Alexander & Atkinson, for appellee.

FISHER, CHIEF JUSTICE.—This is an action by appellant, Taylor, against Judge Goodrich in damages for false imprisonment. A general demurrer was sustained to the petition, and, the appellant declining to amend, his case was dismissed, with judgment in favor of appellee that he go hence with his costs.

The petition alleges that the plaintiff was a practicing attorney and that the defendant, Goodrich, was the judge of the Nineteenth Judicial District, embracing the county of McLennan, and then proceeds as follows:

"That while defendant was acting as judge as aforesaid, and heretofore, to wit, on the 22d day of June, 1894, C. M. King, Frank Dean, I. C. Puckett, Chance Edwards, and Jack Box, of said Coryell County, charged with the murder of Ed. Cash, in said Coryell County, by affidavit before P. S. Woodard, justice of the peace of precinct number 1, said Coryell County, petitioned defendant as such judge for the writ of habeas corpus, alleging, among other things, that they were illegally restrained of their liberty by John W. Hammach, the sheriff of said Coryell County, by virtue of certain writs issued by said justice of the peace, and praying for their discharge from the further custody of said sheriff. That the defendant, on the day and year last aforesaid, granted to said named petitioners the writ of habeas corpus and issued the same to the sheriff of Coryell County, commanding him to bring each of said named petitioners before him (the defendant) in the city of Waco, on Monday, at 9 o'clock a. m., June 25, 1894. That said sheriff of Coryell County, acting in pursuance of said writ of habeas corpus, executed the same on the 25th day of June, 1894, by bringing before defendant C. M. King, Chance Puckett, and Chance Edwards (the presence of the other named petitioners having been waived). That defendant, while sitting in chambers on the 26th day of June, 1894, set free and discharged all of said named petitioners charged with the murder of Ed. Cash except ——.

"Third. That the People's Voice, a weekly newspaper published in Gatesville, Coryell County, Texas, by G. L. Goodman, the editor and proprietor thereof, in its issue of July 3, 1894, editorially criticised the said L. W. Goodrich, defendant, for discharging the said alleged murderers of Ed. Cash, substantially as follows:

" 'You might as well say that black is white as to undertake to make some people in Coryell County believe that Judge Goodrich acted honestly and conscientiously in the Cash case. * * * Judge Goodrich's decision in the Cash case has done Coryell County more harm than the murder itself. The former was an outrage on an individual, the latter a most damnable outrage on a whole community and upon justice itself. * * * Things are coming to a pretty pass when a

district judge in Texas can be persuaded (?) to turn loose on a community a lot of men charged with a villainous murder, without even investigating the evidence in the case. People will have their opinion in such cases, and they have them in this one, and they are not at all complimentary to Judge Goodrich.'

"'THE CASH CASE.

"'There was an unexpected turn in the Cash case last week. The habeas corpus hearing was taken up before Judge Goodrich, of Waco, the State being represented by County Attorney Arnold and T. C. Taylor, and the defendants by W. W. Hair, S. B. Hawkins, and H. N. Atkinson. The record as taken before Judge Woodward was submitted as evidence in the case, but Judge Goodrich refused to read it, and would not permit it to be read in his hearing. He told the attorneys that they could state in their argument all the salient points in the record; but when this had been agreed to, and County Attorney Arnold proceeded to comment on the testimony of Frank Jones, the judge stopped him and said he would not hear that portion of the record commented upon, as he did not believe a word of Jones' statement. The State was ruled against on every point of the ground, and after hearing two or three defense witnesses, which were the defendants and their relatives, the judge rendered a decision turning all the prisoners loose except Jones and Love. This was a great deal more than was expected, and the feeling in Coryell County is running high and Judge Goodrich and those parties who have figured so conspicuously in this matter are being severely condemned on every hand. After hearing the decisions, the officers and attorneys for the presecution were considerably wrought up and expressed their opinion pretty freely. To add insult to injury, Judge Goodrich had them brought before him to answer a charge of contempt of court, for daring to criticise his decision in the case. They were not fined, however, but were permitted to return home to tell their people how they had been treated. There is one thing that is evident, Judge Goodrich acted hastily and unadvisedly in this case, or he was unduly influenced by the statements of overzealous attorneys and friends of the defendants. If he claims to have based his decision on the facts in the case, he must admit that he got all he knew of the facts from the attorneys for the defense, for he refused to investigate the record at all and would not permit the prosecution to read the record in his hearing. He virtually said that he did not believe a word of the record presented by the State, and proceeded to release these defendants on their own statements and statements made by the wife and daughter of one of them. We do not claim that these defendants were the murderers of Ed. Cash, but we do say there is ample evidence in the record implicating them to bind them over to await the action of the grand jury, and nine-tenths of the people of Coryell County believe the same thing. Judge Goodrich may have acted honestly in the matter, but it looks very much like a put-up job to turn these men loose on the community without due process of law. If the judge acted honestly he is a very

poor judge of law, and if he acted otherwise he must have been fixed, or unduly influenced by these parties who have worked day and night for the last six or eight weeks to prevent justice being done to the murderers of Ed. Cash. We believe, and nine-tenths of the people in Coryell County believe, that these parties ought to have been held until the grand jury met, and we believe further that the ends of justice have been knowingly and willfully defeated by the decision rendered at Waco. The decision was rendered at about 4 p. m., Tuesday, but C. M. King sent his wife word at about 11 a. m. the same day that they would all be turned loose and he would be home next day. Dispatches were received here at 2 o'clock stating that all the prisoners except Love would be turned loose. How can these facts be explained unless the decision had previously been agreed upon. It can't be done, and the people of Coryell County will always believe that Judge Goodrich knew what his decision would be before the case was called. These men were justly indignant at the judge's action, and they had a right to be, and none of them ever thought of making political capital out of what they said. Their expressions were of just indignation at a judicial crime that had been committed against Coryell County, and they little thought or cared what the result would be. * * *.'

"That the foregoing editorials were published on the 3d day of July, long after the said King and others were discharged by defendant as aforesaid, their cause tried and determined in chambers, and the defendant's court adjourned, with nothing left for defendant to do in and about said cause.

"Fourth. That heretofore, to wit, on the 6th day of July, 1894, the defendant, while such judge, caused to be entered an order in the minutes of said District Court of said Nineteenth Judicial District, directing the clerk of said court to issue a writ of attachment, directed to the sheriff of Coryell County, Texas, commanding him to attach the bodies of J. L. Goodman, charged with publishing, and J. H. Arnold and the plaintiff herein, with inciting and causing, said publications in the People's Voice as aforesaid, and to bring said Goodman, Arnold, and this plaintiff before the defendant to show cause why they should not be held in contempt of defendant's court by reason of said publications. That in pursuance of said order, entered as aforesaid, the clerk of said court, on the said 6th day of July, 1894, issued said writ of attachment and heretofore, to wit, on the 7th day of July, 1894, said sheriff of Coryell County, Texas, executed said writ of attachment in the town of Gatesville, Coryell County, Texas, by arresting, seizing and taking into his possession the body of plaintiff, as ordered by said writ of attachment, and on the 9th day of July, 1894, brought the body of plaintiff before defendant, acting as judge of said Nineteenth Judicial District, sitting in the city of Waco, McLennan County, Texas.

"Fifth. That plaintiff, on said 9th day of July, 1894, upon his trial charged with contempt of defendant as aforesaid, answered under oath to the jurisdiction of defendant's court, because said publications were

about a cause not then pending before defendant's court as aforesaid, and among other things answered that he was not guilty of causing or inciting said publications, nor was he in any way responsible therefor, nor had he any interest in said newspaper. Defendant, upon the 9th day of July, 1894, upon hearing the answer of plaintiff and the evidence had upon the trial of said cause, which evidence supported and in no respect differed from plaintiff's said answer, adjudged him guilty of contempt, as charged in said order, of inciting and causing said publications, and fixed his punishment at three days confinement in the county jail of McLennan County, Texas, and the payment of a fine of $100, and caused to be entered an order committing plaintiff to the custody of the sheriff of McLennan County, Texas, for the execution of said order of commitment. That said sheriff, acting in pursuance of said order of commitment, July 9, 1894, seized and took plaintiff into his possession and custody, and lodged plaintiff in the county jail of McLennan County, Texas, to serve said three days in jail and to pay or lay out said fine in jail, and held him in said county jail.

"Sixth. That while plaintiff was detained in said jail as aforesaid, James S. Hogg, then Governor of the State of Texas, on the 10th day of July, 1894, directed a telegram to the sheriff of McLennan County, Texas, directing him to suspend the executing of said order of commitment until he, the said Governor, could make further inquiry into the facts upon which said commitment was based, and upon the refusal of the sheriff of McLennan County to suspend the execution of said commitment, on the 10th day of July, 1894, the said James S. Hogg, Governor of the State of Texas as aforesaid, issued his proclamation of pardon, setting aside both fine and imprisonment adjudged by said defendant, and fully and unconditionally pardoned plaintiff of said fine and imprisonment and ordered said sheriff of McLennan County to release plaintiff from further custody.

"Seventh. Plaintiff avers that said publications upon which said fine and imprisonment for contempt of defendant's court were based were published, as aforesaid, about said cause of C. M. King and said other petitioners (for habeas corpus) charged with the murder of Ed. Cash as aforesaid, a cause not then pending, but one that had been tried and determined, and defendant's court, before whom said C. M. King and others were tried, in chambers, as aforesaid, had been duly adjourned. That while plaintiff denies that he instigated, caused or in any manner incited said publications, as is hereinafter pleaded, he alleges that, in so much as said publications were about a cause settled and determined as aforesaid, the newspaper—the People's Voice—had a right to criticise the defendant's judicial action, and for the abuse thereof was answerable in libel only, and not for contempt of court, and that defendant therefore had no jurisdiction over the person of plaintiff for contempt of court, and so fined and imprisoned plaintiff as aforesaid without having any jurisdiction whatsoever over his person, and plaintiff here now

avers that the said judgment fining and imprisoning plaintiff for contempt as aforesaid was null and void and not before a court of law, but before the defendant, L. W. Goodrich.

"Eight. Plaintiff avers that he did not incite or cause said publication, nor contribute to its production in any wise whatever, nor did he have any interest in said newspaper; that he did not know any such publication as aforesaid or of like character would be made in the People's Voice or elsewhere, and as a law-abiding citizen and as an officer of the court by reason of his being an attorney at law, he at all times respected and upheld the dignity of courts and under no circumstances would have intentionally placed himself in contempt of court. Wherefore he says that defendant exceeded his jurisdiction, if any he had, which is denied, in imposing said fine and imprisonment for contempt of court, because there was no evidence of criminality or contempt that warranted the commitment of plaintiff, and defendant's judgment of said commitment was a nullity, and unauthorized by law, and was not the act of a court, but of the defendant, L. W. Goodrich.

"Ninth. Plaintiff avers that the defendant adjudged plaintiff guilty of contempt as aforesaid and fined and imprisoned him therefor as aforesaid, thereby exceeding his jurisdiction, in that under the law the defendant could only fine or imprison the plaintiff, and not do both.

"Tenth. Plaintiff avers that after he had been committed to the custody of said W. L. Burke, sheriff, and by him placed in jail on the 9th day of July, 1894, as aforesaid, upon the request of plaintiff and his friends, James S. Hogg, the Governor of the State of Texas, first on the 10th day of July, 1894, ordered said Burke, sheriff as aforesaid, to suspend the enforcement of said judgment for contempt as aforesaid, and upon the refusal of said sheriff to suspend the execution of said judgment, James S. Hogg, then the Governor of the State of Texas, fully pardoned plaintiff of said fine and imprisonment, and ordered that plaintiff be released. That at the time of the attempted suspension of said judgment as aforesaid, that James S. Hogg, then the Governor of the State of Texas, might have time and an opportunity to inquire into and investigate the causes of the incarceration of plaintiff, and at the time of the full pardon of plaintiff and his release ordered by said Governor, who it is here alleged was the duly and legally elected Governor of the State of Texas and had the right to suspend the execution of said order of commitment or pardon the plaintiff as aforesaid, the defendant, not acting as a court, but as an individual and in his individual capacity, resisted, opposed, ignored, and disrespected the action of the Governor of Texas, and by word of mouth and in writing, not as a court, but in his individual capacity, directed and commanded the said W. L. Burke, then sheriff as aforesaid, to pay no attention to the said action of the Governor of Texas, but to hold plaintiff in jail until he satisfied the judgment of defendant's court, and that the defendant threatened the said W. L. Burke with violent action in case he did release plaintiff from jail. That the said W. L. Burke was desirous of

releasing plaintiff upon his pardon as aforesaid, and would not have held him in custody had it not been for the threats, orders, and directions of the defendant, and it is here averred that after plaintiff's pardon as aforesaid defendant's action was that of an individual and wholly unauthorized by law, and that plaintiff's detention was without authority and null and void.

"Eleventh. Plaintiff avers that defendant's action as aforesaid in fining and imprisoning him as aforesaid and detaining him in jail after duly pardoned was without lawful authority and null and void, and was the result of malice and a violent temper. That defendant was very angry on account of said publications; and in his anxiety to avenge himself willfully, wantonly, and maliciously, and without any reasonable or probable cause or lawful authority, and against the will of plaintiff (notwithstanding his frequent demands for freedom) the defendant, on the 9th day of July, 1894, had plaintiff imprisoned as aforesaid and kept, held and detained him in prison until 9 o'clock a. m. of the 11th day of July, 1894, when plaintiff was released upon his petition for habeas corpus to the Court of Criminal Appeals of the State of Texas.

"That plaintiff's imprisonment and detention in prison was tyrannical and contrary to the laws of the State of Texas and against plaintiff's will, by means whereof plaintiff was prevented from transacting his ordinary business or going where he pleased.

"Plaintiff avers that he has always conducted himself as an upright, honest, peaceable and law-abiding citizen, and that his imprisonment aforesaid, not only on account of himself, but his wife and children, caused him great trouble, mental and physical anguish, and the deepest of humiliation. That he sustained a great loss of time in consequence of said imprisonment and was exposed to great costs, and here avers that on account of defendant's malicious and reckless regard for the law, the liberty of the citizen and the rights of plaintiff, defendant willfully and wantonly contrived to injure the credit, fair name, reputation and character of plaintiff, to his total damage the sum of $15,000.

"Premises considered, plaintiff prays for citation in terms of the law, and on final hearing judgment for his damages and all costs, and will ever pray."

Opinion.—The request is made to this court to decide the perplexing and interesting questions whether the publications set out in the petition were a contempt of the court over which Judge Goodrich presided, or were simply libels upon his official character, for the redress of which he was solely relegated to a civil action in damages. This request is made upon the contention that the court did not have jurisdiction to punish the plaintiff for contempt, because the publications were not concerning a matter then pending officially before the court, but, upon the contrary, they related to the action of the court in a matter that had been finally determined and disposed of. It is not, and we suppose could not successfully be contended that the publications are true or that they

are not grossly libelous and serious reflections upon the integrity of the court. But whether they constituted a contempt of court is a question we are not required to decide, in view of the rulings we make upon other questions in the case. There is a conflict of authority upon this question. Some maintain that a publication reflecting upon the court or judge after the final disposition and conclusion of the proceeding to which it relates is not a contempt, but, if false, is a libel, for which the judge may have his action in damages. In re Pryor, 26 Am. Rep., 749; State v. Anderson, 40 Iowa, 207; Storey v. People, 79 Ill., 48; Cheadle v. State, 110 Ind., 309. Others hold that at common law a publication reflecting upon the court that may bring it into disrepute is a contempt, although the matters to which it relates may have ended and finally concluded. State v. Morrill, 16 Ark., 385; In re Chadwick, 67 N. W. Rep., 1076; State ex rel. Conner v. Stapleton, 23 Law. Rep. Ann., 787. At present we take no stand upon these diverse views, but will dispose of the case upon other grounds.

In the present state of the pleadings there are but two questions which we deem it necessary to decide. The first is whether a judge of the district court, when in the exercise of its general jurisdiction over the subjects of contempts and over the person of one who has been brought before him on such a charge, may be held liable in damages to the one it has punished when as a fact he was not guilty of the contempt or when the alleged contemptuous conduct was not in law a contempt of court. In other words, if such general jurisdiction of the court exists concerning the subject and person dealt with, may it, for exercising such jurisdiction, be held civilly liable for the errors it has committed, or may it be held liable for asserting its jurisdiction in a case where, by reason of its peculiar facts and the law as applied thereto, it should not have done so? The second question is: Did the Governor have the authority to pardon the plaintiff and remit the fine and imprisonment inflicted by the court, and if so, may the defendant be held civilly liable for the conduct alleged in aiding and assisting and advising in the further restraint of the plaintiff in his liberty after the grant of pardon?

In this connection it is well for us to explain what we understand to be the effect of the averments of the petition. The allegations to the effect that the defendant was an active agent in advising and preventing the sheriff from releasing the plaintiff by virtue of the pardon are sufficient in stating a cause of action against defendant, provided the Governor had the authority to extend the pardon. For these averments are to the effect that the conduct of the defendant in this particular was not that of a court, exercising its judicial functions, but was the act of the judge and that of the defendant as an individual; and if such was the case he would be held liable as anyone else who illegally participated in restraining another in his liberty. The remaining allegations are to the effect that the court did not have jurisdiction to punish the plaintiff for contempt, and that it exceeded its jurisdiction in this respect. There are statements, in this connection, to the effect that the court, in assum-

ing jurisdiction and inflicting the punishment, acted as a judge or an individual. These statements were evidently based upon the conclusion, previously asserted, that the court acted without jurisdiction, and we do not understand that it was the purpose to charge by these averments that the judge was not sitting as a court when the contempt proceedings were considered and disposed of. If the judge had heard and determined the matter of contempt and inflicted the punishment at a time when he was not acting as a court, a different case would have been presented, as the proceedings would have been coram non judice and void, for the statute confers the jurisdiction upon the court, and not upon the judge. With this construction of the averments of the petition, we will return to the questions to be disposed of in the order stated.

Article 1120, Sayles' Civil Statutes, which was in force when the contempt proceedings were heard and determined, is to the effect that the district courts may punish by fine not exceeding $100 and by imprisonment not exceding three days any person guilty of contempt of such courts. It was under this statute, it seems, that the court proceeded. There is no statute law which undertakes to define what is a contempt or under what circumstances the district court may exercise its jurisdiction in such matters. But it is well known that the district courts are courts of general jurisdiction over subjects under their control, and it must be admitted that the statute that confers jurisdiction upon these courts in contempt cases is as general in its terms and as broad in its scope as any other statute that confers jurisdiction upon these courts in other instances. Hence these courts, when acting in contempt proceedings, are in the exercise of their general jurisdiction over a subject confided by law to their cognizance, and when thus proceeding they are acting judicially in a like manner as if they were exercising their jurisdiction over any other subject or case confided to them by law. If the court is proceeding in inquiry of a subject of which it has jurisdiction, it must necessarily be clothed with the judicial discretion to ascertain and determine whether it should proceed and if it is proceeding in the right way, and if the facts and circumstances have arisen that authorize it to act and to proceed to judgment. The functions of the court when exercised in proceedings of this character are no less judicial than those exercised in other cases. Hence the law that relates to the liability and nonliability of courts when acting judicially applies when the acts complained of arise in a case like this, as they apply generally to all judicial acts done by a court when considering a subject within its general jurisdiction.

It is a doctrine well settled in this country that a judge, for the exercise of judicial discretion when sitting as a court over a subject within its jurisdiction, can not be held liable in damages by one claiming to be injured as the result of the official conduct. Rains v. Simpson, 50 Texas, 495; Bradley v. Fisher, 13 Wall., 344; Cooke v. Bangs, 31 Fed. Rep., 640; 7 Am. and Eng. Enc. of Law, 668; Mechem, Pub. Off., secs. 619-635. The reasons for this rule are generally well understood, and are stated in the authorities cited, and they need not be repeated by us. And

if the court is acting upon a subject within its jurisdiction, this immunity extends also to judicial conduct that may have been influenced by malicious or improper motives. If the court has jurisdiction of the subject and is proceeding judicially in order to reach a result, the legality of the final conclusion can in no manner be affected by the ulterior motives of the judge that influenced him in reaching that conclusion. The reasons that influenced him would have no bearing in determining whether his judicial conclusion was lawful or not. The question of motive is apart and distinct from the exercise of the judicial discretion of the court, for if judicial results were to be controlled by the motive that brought them about, and the exercise of judicial discretion was to be governed by the motive that influenced it, we would review and determine judgments, not upon the rules of law and equity that apply in such cases, but upon the personal feelings, animus, bias, and prejudice of the judge of the court whose judgment we were reviewing. Such a doctrine as this of course is unheard of. If the court in the case of contempt we are considering had jurisdiction, its judgment can not be impeached or inquired into because the judge may have been influenced by wrong motives in rendering it.

This whole question is so fully discussed by the Supreme Court of the United States in Bradley v. Fisher, supra, that we set out the views of that high court upon the subject:

"The plea, as will be seen from our statement of it, not only sets up that the order of which the plaintiff complains was an order of the criminal court, but that it was made by the defendant in the lawful exercise and performance of his authority and duty as its presiding justice. In other words, it sets up that the order for the entry of which the suit is brought was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act and the jurisdiction of the court, the defendant can not be subjected to responsibility for it in a civil action, however erroneous the act may have been and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer everyone who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

"The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has

never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, 'a deep root in the common law.'

"Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives can not in this way be the subject of judicial inquiry. This was adjudged in the case of Floyd and Barker, reported by Coke, in 1608, where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would 'tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations.'

"The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

"If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did

with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

"Some just observations on this head by the late Chief Justice Shaw will be found in Pratt v. Gardner, and the point here was adjudged in the recent case of Fray v. Blackburn, by the Queen's Bench of England. One of the judges of that bench was sued for a judicial act, and on demurrer one of the objections taken to the declaration was, that it was bad in not alleging malice. Judgment on the demurrer having passed for the defendant, the plaintiff applied for leave to amend his declaration by introducing an allegation of malice and corruption; but Mr. Justice Compton replied: 'It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions;'—and the leave was refused.

"In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. In some States they may be thus suspended or removed without impeachment, by a vote of the two houses of the Legislature.

"In the case of Randall v. Brigham, decided by this court at the December term of 1868, we had occasion to consider at some length the liability of judicial officers to answer in a civil action for their judicial acts. In that case the plaintiff had been removed by the defendant, who was one of the justices of the Superior Court of Massachusetts, from the bar of that State, and the action was brought for such removal, which was alleged in the declaration to have been made without lawful authority, and wantonly, arbitrarily, and oppressively. In considering the questions presented the court observed that it was a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that if this were the case with respect to them, no such limitation exised with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, 'unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly.' The qualifying words were inserted upon the suggestion that the previous language

laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.

"In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgment may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons.

"The distinction here made between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject matter exists, was taken by the Court of King's Bench, in Ackerly v. Parkinson. In that case an action was brought against the vicar-general of the bishop of Chester and his surrogate, who held the consistorial and episcopal court of the bishop, for excommunicating the plaintiff with the greater excommunication for contumacy, in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin, the citation issued to him being void, and having been so adjudged. The question presented was, whether under these circumstances the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside, on appeal, on that ground. Lord Ellenborough observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject matter, although the citation was a nullity, and said, that 'no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, inverso ordine.' Mr. Justice Blanc said there was 'a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;' and held that where the subject matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should by reason of the error be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction.

"The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject matter, though irregularity and error attend the exercise of the jurisdiction, the exemption can not be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

If the District Court of McLennan County had general jurisdiction over the subject of contempts—which we have seen to be the case—it follows that it may and should exert its judicial discretion in order to ascertain if it should exercise jurisdiction in the particular case and if

the conduct complained of is a contempt of its court and if the accused is the guilty agent. Its duty in this respect is no wise ministerial, and must in the nature of things be exercised judicially in order to reach a final result. And if in such cases in the exercise of its judicial functions it falls into error or reaches a conclusion not warranted by the facts and assumes to hold the accused guilty when he is in fact innocent, or erroneously holds, when applying the law, that the facts of that particular case constitute a contempt, these would be mistakes and errors of judgment that were committed by the court in investigating a subject confided to its general jurisdiction, for which it would not be liable. It can not be said of the court in this case that it did not have jurisdiction of the subject matter, but the most that may be said is that it committed an error in holding the accused guilty and erroneously held the doubtful question that the publication was a contempt under the law. If the judge in this instance could be held liable for failing to correctly construe the facts and apply the law, he may be held liable in any case where he is proceeding about a subject matter within the jurisdiction of his court when he may erroneously hold a defendant guilty, and as a result deprive him of his liberty. For instance, the district courts have general jurisdiction in cases of theft. Now, the court, in a trial of such a case, may commit an error which might result in an innocent man being punished and deprived of his liberty. In such a case the law and the profession well understand that the judge can not be held civilly liable, for the error and mistake were committed when in the exercise of judicial functions over a subject within the jurisdiction of his court. This is well illustrated by the reasoning of the court in Bradley v. Fisher, supra.

The more difficult question in the case is the second one, which relates to the authority of the Governor to extend pardons in cases of contempt. In justice to the Governor who issued the pardon for the relief of the plaintiff it should be said that there is respectable authority for his course in that matter, and that there is a difference of opinion among eminent members of the legal profession in this State as to whether the executive may pardon in contempt cases. The cases of Ex parte Hickey, 4 Smedes & Marshall (Mississippi), 783, and State of Louisiana ex rel. Van Orden v. Sauvinett, 24 Louisiana, 119, are the two most notable cases called to the attention of the court which support the authority of the Governor to grant pardons in such cases. The principal reasons upon which these cases rest are that those courts construe a contempt as a criminal case, and therefore it is embraced in the category of crimes which may be pardoned. The correctness of the ruling in the Mississippi case can be rested upon the peculiar language of the Constitution of that State upon the subject. It authorizes the Governor to grant pardons and remit fines in all criminal and penal cases, except treason and impeachment. The term "penal cases" may possibly be held to embrace contempts. But the Louisiana case is based upon the sole proposition that a contempt is a crime against the State, and the case is

therefore criminal. The court in that case, in persuading itself to the view that a contempt is a criminal case, resorts to argument that is clearly fallacious. It is there contended that it is essential that the pardoning power should exist in such cases, because it is necessary that the Governor, as the balance of power, should have the authority to hold in check the abuses of the courts in the exercise of tyrannical and despotic authority in the performance of their judicial functions. It is possible, as indicated from the history of Louisiana at the time the decision in that case was rendered, that there was a necessity for such a rule in that State, and that the danger to the citizen from the tyranny and usurpation of the courts may have been more real than fancied; but it is extremely doubtful if such conditions ever existed or will ever exist in any other of the States of the American Union where it may be necessary to clothe the executive of the State with authority to correct and control abuses by the courts. In this enlightened age the conservatism of the judicial departments of governments is usually recognized and relied upon in all civilized nations as the power to which is properly confided the rights of property and life and liberty of the citizen. And it is a novel argument that there exists a prerogative in another department of the government—not by virtue of express law, but by reason of the apprehension that the courts will abuse their authority—to substitute its opinion for that of the courts and to assume judicial functions which do not belong to it and inquire into the legality of a conviction and whether the judge acted properly and with due regard to the rights of the defendant in the trial of the case. If such authority is granted by the Constitution it may be exercised, but if not, the danger feared by the Louisiana court would be no justification for executive interference, and in such a case the usurpation would come from him, and not the court. The Governor is not the representative of sovereignty, nor has he any supervisory control over the courts by virtue of his office, and his functions, like those of the courts, can only be found in the written law that defines his authority.

We will not concern ourselves further about the reasons given in the Louisiana case and in other cases why the Governor may extend pardons in cases of contempt, as we will look to our own Constitution for his authority in such matters.

It is a familiar rule of construction in this State that when the Constitution defines the powers of an officer he is confined to the powers enumerated, and the express mention of such powers negatives the existence of others. The Constitution of this State declares that in all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, to grant reprieves, commutations of punishment and pardons, and under such rules as the Legislature may provide he shall have power to remit fines and forfeitures. The Legislature, as provided in the Code of Criminal Procedure, has authorized him to remit fines and grant pardons in criminal actions. The real inquiry is whether

a contempt proceeding is a criminal case, within the meaning of this constitutional provision.

If the words "criminal case" are confined to the crimes mentioned in the penal code and should be held to be construed only as the term crime and offense is therein defined, there would be little difficulty in reaching a correct conclusion upon this question, for the question of contempt is not mentioned in the penal code and is not there characterized as a crime or offense.

When we inquire into the reason of the law that confers the power upon the courts to punish for contempts we can not well perceive that the Constitution, in authorizing the executive to pardon crimes and remit fines in criminal cases intended that the power should be exercised in contempt cases and that such cases should be regarded as criminal. The efficiency and integrity of courts demand that they shall have the right, in order to transact their business in an orderly way, to require the observance of decorum and to punish those who may interfere with them when exercising their judicial functions or who may at such times by willful conduct interfere with the peace of the court or bring it into contempt. If the power is given to the Governor to pardon in cases of this character, it admits the weakness and want of the power in the court to preserve its standing and to protect itself from contempts, and would virtually lodge in the Governor the final power to determine if a contempt has been shown to the court and whether the party should be punished. Such a concession of authority is incompatible with many provisions of law on the subject of contempt. How could a court preserve the ends of justice by compelling an unwilling witness to testify if the Governor could relieve him from the punishment inflicted by the court for his refusal? How may a court enforce its orders in injunction and mandamus and in other proceedings if a Governor may virtually set them aside by pardoning the one who has willfully disobeyed them? How may obedience to the process of the court be enforced if a Governor may stand between the court and the one that has disobeyed it? How may a court in an orderly and efficient way perform its official functions and public duties if a Governor may paralyze its power in furtherance of these ends? The moment you admit that a Governor has the power to cripple a court in the performance of its duties in the way noticed, then it virtually follows as a sequence that the courts in the administration of justice are under the control of the Governor, and while he can not influence their judicial acts and conduct, he may control it. It is not believed that the Constitution of this State intended to invest him with any such power. And it is believed, as before said, that the term "criminal cases," as there used, was intended to be understood as meaning those cases and crimes provided for in the criminal code, for which a conviction must be had in the manner provided by law for the trial of criminal cases. The Constitution, as well as the law in all criminal cases, gives to the defendant the right of trial by jury, but it has never in this State been held that a defendant charged with contempt was entitled to a jury, except,

possibly, in proceeding against an attorney at law when charged with a contempt involving fraudulent or dishonorable conduct or malpractice. But, upon the contrary, it has been expressly decided that in contempts, except where the statute directs otherwise, there is no trial by jury allowed. Crow v. State, 24 Texas, 12. And it is also held in Casey v. State, 25 Texas, 384, that a contempt is not such a criminal case as may be appealed. And to the same effect is the State v. Thurmond, 37 Texas, 340. In Scott v. State, 86 Texas, 321, in a well considered opinion by the present Chief Justice of the Supreme Court, it was held that a proceeding to disbar an attorney was not a criminal case; and it is there said, quoting from Abbott's Law Dictionary, that a criminal case is defined to be "an action, suit or cause instituted to secure conviction and punishment for crime." Black, in his Law Dictionary, 302, defines a criminal case to be an action, suit, or cause instituted to punish an infraction of the criminal law.

The court in the Scott case, 86 Texas, 321, in determining that a disbarment proceeding is not a criminal case, lays much stress, and properly so, upon the fact that on the subject of crimes our code of criminal laws is supposed to be complete, and that no act is regarded in this State as a crime unless it is so declared by statute law and fully defined; and as the criminal code was silent upon the question of disbarment, and the proceedings that regulated it were only found in the civil code, that the conclusion should be reached that it was not a criminal case, and therefore the Court of Civil Appeals had jurisdiction of it on error.

If the court in that case properly held, which was doubtless the case, that a disbarment proceeding was not a criminal case, for a like reason it should be held that a contempt is not a criminal case; for no where in the criminal code is the subject mentioned, but all there is that relates thereto is found in the civil statutes. Further, a proceeding to disbar an attorney and remove him from his office is as much a matter of public interest as a proceeding in contempt, and the dishonorable conduct and malfeasance in office for which he may be punished by being stricken from the roll is as much an offense against the public as would be a contempt of court. The punishment inflicted upon the attorney by removal from office is in a sense penal in character, and he is made to suffer this penalty as a punishment for the wrong he has done the public; and that public has the same direct interest in his punishment and receives the same benefit thereby, in contemplation of law, as would be the case of one punished for contempt.

If the Supreme Court in the cases of Crow v. State, 24 Texas, and Casey v. State, 25 Texas, supra, had regarded contempts as criminal cases under the law in this State, they would not have denied in the one case the right of appeal, and in the other the right of trial by jury; for the law, in granting the right of appeal and trial by jury, applies alike to all criminal cases. Hence these decisions, in our opinion, are direct authority against the proposition that proceedings in contempts are criminal cases, as that term is understood and meant by the laws of this State.

The Supreme Court of Michigan, In re Chadwick, 67 Northwestern Reporter, 1074, also holds that proceedings in contempt are not criminal cases.

There is also another reason which is simply persuasive that may be advanced why contempts in this State are not regarded as criminal cases. The practice is universal in the courts of this State to exercise, when they so desire, the discretion to remit the punishment inflicted by them in such cases. If contempts were such criminal cases, within the meaning of the Constitution, that the Governor could pardon, the discretion so often and frequently exercised by the courts in remitting the punishment in such cases would be unauthorized, for they have no power to remit fines in criminal cases or grant pardons, for the jurisdiction of the Governor in these matters is exclusive. It can not be believed that this authority, which has so long been exercised and recognized, would have passed to this time unchallenged if it had been by the courts and the law regarded as unwarranted. The vigilance of the counties and the law officers who are interested in fines imposed in such cases would have questioned the authority of the courts to remit, if it had been believed that contempts were criminal cases, within the meaning of the law. Attention is only called to this aspect of the question as having some bearing in interpreting the term "criminal cases," as used in the constitutional provision relating to pardons, as it shows the uniform construction placed upon the statutes punishing contempts by the courts and the officers charged with its execution.

We extend the discussion of the questions passed upon no further, and hold that as the District Court had jurisdiction of the matter of contempt, although it may have exercised it to an erroneous conclusion, the judge was not liable, and also hold that the Governor did not have the authority to extend the pardon in this instance, and for these reasons the demurrer was properly sustained.

Affirmed.

Gulf, Colorado & Santa Fe Railway Company v. F. L. Dennison.

Decided January 9, 1901.

1.—Railway—Contract for Hauling Freight.

A railway company was liable for breach of a contract whereby plaintiff was to haul to its depot all freight for shipment over its road originating within certain limits, for a fixed compensation, and can not escape liability for depriving plaintiff of the right to perform the service at the price agreed upon by having it delivered to another road at the initial point and hauled by that road to another point on its line before receiving it, where the person controlling the routing of the shipment designated defendant's and not the other road as the route.

2.—Case Distinguished.

This case distinguished on the facts from that presented on the former appeal, of Railway v. Dennison, 22 Texas Civil Appeals, 89.

COLLARD, ASSOCIATE JUSTICE.—Suit by appellee, a firm doing business under the name of Thos. Bell, composed of Thos. Bell and H. P. Williams, filed 21st February, 1899, amended original petition filed May 7, 1900, against appellant, Insurance Company of North America, charged to have an office in the city of Brownwood, Texas, conducted by the agent, E. B. Henly & Co., a firm composed of E. B. Henly. The petition alleges that plaintiff was doing business buying, selling, and exporting cotton to foreign markets; that on the 24th October, 1898, plaintiff applied to defendant's local agent at Brownwood, Texas, for additional insurance in the sum of $1350 on 900 bales of cotton shipped from Brownwood, Texas, via the Gulf, Colorado & Santa Fe Railway, to Galveston, and thence, via the steamship Brinkburn, to Havre, France, and offered to pay the premium therefor; that defendant, by its agent E. B. Henly & Co., accepted said risk and informed plaintiff that the policy of insurance would be issued on the same day, but that the policies or certificates of insurance were not issued and delivered to plaintiff by defendant or its agent till the 15th day of December, 1898, about which date defendant's agent demanded and collected of plaintiff the premium thereon, $18.75; that plaintiff relied upon defendant's agent that the risk was carried and that the policies would be issued immediately, and so believing, took out no other insurance on the cotton; that the cotton was loaded on the steamship Brinkburn, destined for Havre, France, but that the ship was wrecked in a storm off the south Atlantic coast, while in voyage, about December 15, 1898, and the cotton lost, none of it ever having been recovered. It is alleged that the cotton was worth the full amount of the policy; that the defendant immediately denied liability for the loss, and hence no proof of loss was furnished defendant.

By supplemental petition, after general demurrer to defendant's answer and general denial of the same, plaintiff, replying to defendant's answer, in which it is alleged that plaintiff failed to notify the defendant by letter or telegram of the risk or contract, says, that if the plaintiff was required by the terms of the risk or contract to give such notice to defendant, which is denied, defendant, at the time of taking the risk, had, by its previous course of dealing with plaintiffs, induced them to believe and plaintiffs did believe that such notice was not required, and defendant had in fact waived such notice from them, in this, that about the 1st of September, 1898, plaintiff had been making such contracts of insurance with defendant through E. B. Henly & Co., its local agent at Brownwood, Texas, who issued all certificates of insurance on such risks, and from that time till the 24th October, 1898, and almost daily during that time, defendant, through its said agent, had issued to plaintiff many such certificates of insurance on several thousand bales of cotton, and plaintiff had paid the regular premium therefor, which had been received by defendant, during all of which time plaintiffs never at any time notified defendant by letter or telegram of such risk, but that defendant was notified by its agent, and defendant at all times accepted the risk and the premiums paid and paid for all

losses sustained by the risks, without any complaint whatever that it had not been advised thereof by plaintiffs. That such notice would have been given by plaintiffs if it had been insisted on by defendant; but plaintiffs were led to believe and did believe, from defendant's conduct and course of business and from the fact that defendant's agent gave the notice, that no such notice was expected or required of plaintiffs; that about the 15th of December, 1898, plaintiffs paid defendant, through its agent, the sum of $18.25 as premium of the risk or contract of insurance sued on in full payment of the risk, and defendant accepted the same and has retained it.

Wherefore plaintiff alleges that defendant has waived the stipulation requiring notice from plaintiffs of the risks and is estopped to rely on the same or failure to comply with the same.

Defendant demurred generally to the pleadings of plaintiffs, and specially, because it is not alleged that defendant accepted the alleged risk or at any time entered into any contract of insurance with plaintiffs on the 900 bales of cotton; because the petition shows that if any contract of insurance was entered into the same was oral and void and the petition fails to set out the terms of such contract. Because the petition shows that if any contract of insurance was entered into it was not until the loss had occurred.

Defendant answered by general denial, and specially that plaintiffs failed to notify defendant of the risk by letter or telegram as soon as known to the assured, as the policy of date August 31, 1898, stipulated and provided, and that for that reason the risk was never accepted and no such risk was ever taken by defendant; and again alleged that at the time the contract sued on was issued the cotton covered thereby was already lost and the loss was known to plaintiffs, because of which the policy was void and was repudiated by defendant as soon as advised of the same.

Defendant denies that E. B. Henly & Co. or E. B. Henly was ever at any time its agent in matters of insurance except to collect and remit to it premiums on insurance of the cotton of plaintiffs for the season of 1898-1899, but that in all things relating to the insurance of cotton he was the agent of plaintiffs.

Defendant specially denies that it ever waived notice of any risk being given to it at the home office as stipulated in the policy. It also denies that it received the premium for the risk sued on; but repudiated such collection as soon as notified, and if the same was collected by E. B. Henly & Co., it was without its knowledge and consent, and if it received the same it offers to credit the same on the cross-bill filed.

The foregoing answer is sworn to by Rice, attorney for defendant.

Defendant also filed a cross-bill for $562.07, for unpaid insurance on cotton issued by defendant to plaintiffs at divers times from November, 1898, to January, 1899, under an open policy, an itemized account of which is filed with the answer, which, it is alleged, plaintiffs have refused to pay.

We find the facts as follows:

The cotton was shipped, as alleged, from Galveston, Texas, to Havre, France, on the ship Brinkburn, which, with all the cotton, was lost in a storm at sea. The cotton was insured by defendant as alleged, and plaintiff applied to E. Henly & Co., E. Henly being the company, residing at Brownwood, Texas, for an additional 5 per cent insurance on the cotton, which was legitimate and was allowed by Henly. Henly did not issue the certificates covering the additional 5 per cent on the cotton until the 15th day of December, 1898, the day of the loss of the vessel and the cotton, but the loss was not known until several days after. There was an open policy issued by defendant insurance company to Bell at the beginning of the season, which became operative as insurance from the time special lots of cotton were afterwards insured, evidenced by certificates covering the same, but it was in proof that defendant would insure cotton for plaintiff before certificates were issued, and it is in proof that the insurance in question was taken and agreed on by plaintiff and Henly before the 15th day of December, 1898, and before the wreck of the vessel.

It is in proof that Henly acted for defendant insurance company, granting insurance in its name, which contracts of insurance were respected by the company and acted on, and thus insured numbers of shipments of cotton for plaintiff in the name of the company.

There is a stipulation in the open policy as follows: "Risks covered under this policy to be advised, as soon as known to the assured, to the Insurance Company of North America, 232 Walnut street, Philadelphia, by telegram or letter." Plaintiffs did not notify the company of this insurance according to the stipulation, but it was shown that in numerous other shipments issued by defendant this provision was not complied with, and it was in proof that this was the course of business with plaintiffs. It was in proof, and we so find the facts. The plaintiffs had already taken out policies on this lot of cotton, covering its value and 5 per cent additional, and being advised by the consignee of the cotton at Havre, France, that the policy should cover not only the value of the cotton and 5 per cent additional, but 10 per cent additional to cover the cost of transportation, they procured the additional 5 per cent as stated. They applied to Henly for the additional 5 per cent and he granted it; as in other cases issued no certificates at the time, but stated that it would be considered as insured for the additional 5 per cent from the time of the application. He postponed the issuance of the certificates until the 15th day of December, 1898, when he did issue the certificates,—forwarding one to the company, delivering one to the plaintiffs, and the other was attached to the invoice and bill of lading to be sent with the draft to collect for the cotton, but, as before stated, on the same day the vessel and its contents, with the cotton, was wrecked in a storm at sea and nothing recovered, which fact was not known by the parties to the suit until several days after. The course of business as conducted by the parties was: Defendant would cover

or insure cotton for plaintiffs before any certificates were issued; this was done by plaintiffs notifying Henly that they desired a certain number of bales insured provisionally and he would tell them all right, and he would then notify the company at the home office. In some instances the cotton would not be bought, but when he would get an order for it he would have it covered provisionally and when it was bought, invoiced, and ready for shipment, Henly would issue the certificates. "No particular time was mentioned in the marine insurance, but it was just covered from the time it was bought at different points in the interior to the end of the voyage."

In November, 1898, plaintiffs applied for the additional 5 per cent insurance on the cotton on the ship Brinkburn; the agent replied: "All right; give me the marks and numbers of bales on the certificates already issued on it and I will write it up." He said he would do so whenever he got time, and "We'll just consider it covered." He was asked by plaintiffs if he had not better notify the company, and the agent replied no, it was not necessary, and he did not notify the company until he sent it the certificates, December 15, 1898. Henly collected the premium on the additional insurance and sent it to the company, and it received the same, which it has retained. The evidence does not show whether or not the ship was in fact wrecked before the certificates were issued, but it occurred on the same day. The evidence shows that Henly was the agent of the company in soliciting the insurance and in issuing the certificates.

The account of defendant against plaintiffs was correct and due, and was credited by the jury and the judgment of the court without objection on the part of the plaintiffs, the verdict and judgment for plaintiffs being for the balance due on the additional insurance as shown by the certificates of insurance.

Opinion.—1. The court submitted the case to the jury on special issues and questions,—the jury answering: (1) that the cotton in controversy was insured by E. B. Henly as the agent of the defendant; (2) that the cotton was insured prior to its loss; (3) that the defendant had accepted the premiums on the additional insurance; (4) that the defendant company was advised of the additional insurance as soon as known to the assured; (5) that defendant by its conduct or silence led Bell to believe that notice from him of the risk was not required; (6) and that E. B. Henly informed plaintiffs that it was not necessary to give notice of the verbal contract of insurance. There was testimony supporting the findings of the jury on all the issues submitted from 1 to 6 inclusive, and it can not be said that the verdict was not supported by the evidence. On the contrary there was evidence to support it, and it was not error to refuse a new trial upon the alleged ground that the verdict was contrary to and against the evidence.

2. We find no error in the refusal of the court to instruct the jury to find for defendant. The clause in the open policy requiring plain-

tiffs to advise the company of the additional insurance was ignored by the parties in their previous dealings. It was not enforced, and the course of business previously pursued by the parties waived the performance of the stipulation on the part of the assured. It will be remarked that no penalty is provided for in the contract in case of failure to comply with the stipulation, nor does its importance appear so as to make it a condition to performance by the company.

3. The court did not instruct the jury as to what would constitute Henly the agent of the company, but merely required them to find on the issue of agency. Defendant asked no charge upon the subject, and we can not say there was error in the omission. The attempt of appellant to make Henly the agent of Bell can not avail. There was no such written stipulation in the policy or elsewhere, but if it had been so stipulated the facts would remain and he would be the agent of the company and it would be bound for his acts done in the scope of his authority. He acted for the company, issued certificates for it, sent in the premiums which were accepted by it without objection, and was recognized by it as its agent to do what he did do. This was the usual course of the business, and it may be said he was held out by the company as its agent to do what he did do. His acts, then, in the scope of such apparent authority, would bind the company. Am. and Eng. Enc. of Law, pp. 334, 335, and authorities cited; Id., 320, 321, 322, and notes. Even where it is provided that an agent can not change terms and conditions and they shall not be changed or waived except by the president in writing, the agent may waive if he is otherwise competent. Id., 338, 339. Especially when the company recognizes such acts on the part of the agent and accepts the same with its compensation and results.

We have considered every assignment of error and have concluded that none of them can be sustained. The judgment of the lower court is therefore affirmed.

Affirmed.

MISSOURI, KANSAS & TEXAS RAILROAD COMPANY OF TEXAS v. T. D. DAVIDSON.

Decided January 9, 1901.

1.—Judgment by Default—Failure to Answer—Diligence.

No sufficient excuse for failure to file answer appears from the fact that the general attorney of a railway sent the citation to the attorneys charged with the defense of the case three days before appearance day, and in time to file answer but for unforeseen contingencies which prevented it, where it appeared that citation had been served and received by such general attorney twelve days before appearance day.

2.—Railway—Flood—Extraordinary Rainfall.

A railway company is not excused from liability for overflow of land and destruction of property due to the presence of its embankments by the fact that it proceeded from an extraordinary and unusual rainfall; the rainfall must be unprecedented or it was the company's duty to anticipate and guard against it.

3.—Value—Intrinsic—Market—Pleading.

A general allegation that articles were of a named value is sufficient to permit proof that they had no market value and evidence of their intrinsic value.

4.—Evidence—Opinion—Value.

Opinions as to value are not properly expert evidence, and the evidence of a witness who had not seen the household goods in question, based on a description and his knowledge of the value of such goods generally, is not admissible.

5.—Damages—Excess—Remittitur—Costs.

Though a judgment for $390 was reduced and reformed in accordance with appellant's remittitur of the sum of 80 cents, so slight an excess did not justify taxing the costs of the appeal against appellee.

Appeal from the County Court of Williamson County. Tried below before W. F. Robertson.

The citation in this case was served on defendant's local agent May 22; received by its general attorney at Dallas May 23; sent by him, after employing the interval in having investigation made of the facts, to local attorneys at Bastrop who were to defend the case, at 5:50 p. m. on Saturday, June 2, being delayed in transit; and the motion to set aside default detailed their unsuccessful efforts to procure, by telephone, an attorney at Georgetown to file answer before default was taken, which was on appearance day, the morning of June 5.

Brown, Lane & Garwood and *Paul D. Page,* for appellant.

W. H. Nunn and *W. W. Nelms,* for appellee.

KEY, Associate Justice.—Suit for damages; judgment by default and damages subsequently assessed by a jury. Defendant has appealed. On the points presented for decision, we hold:

1. No error was committed in overruling the motion to set aside the judgment by default. The citation was served thirteen days before appearance day, the day on which the judgment by default was rendered, and, if it be conceded that the attorneys who presented the motion and represent appellant in this court exercised sufficient diligence, we can not hold that other agents and representatives of appellant were not guilty of negligence in reference to filing an answer. The citation went into the hands of the general attorney twelve days before appearance day, and no sufficient excuse is shown for his failure to file an answer or place the matter in the hands of other attorneys in time for them to file an answer. Besides, the defense set up in the motion was insufficient. It did not state that the flood which caused the injuries complained of by the plaintiff was unprecedented, but denominated it an extraordinary and unusual rainfall or flood. This was not sufficient. The law requires railroads in the construction of their roadbeds to guard against all such floods as may be anticipated, though some of them may be extraordinary and unusual. Railway v. Pomeroy, 67 Texas, 498.

2. We do not think the court erred in permitting the appellant to

prove the intrinsic value of the property lost. The petition alleged in general terms that the various articles were of the value of so many dollars. This did not limit the plaintiff to proof of market value; and, having proved that the property had no market value, proof of its intrinsic value was admissible.

3. The court did not err in excluding the proffered testimony of S. M. Strayhorn. It was not competent for him to give his estimate of the amount of the plaintiff's loss. Such testimony is not in any proper sense expert evidence. It was not proposed to prove by the witness that he had seen the property and had knowledge of its value.

4. We do not feel justified in holding that the verdict is excessive, except to the extent of 80 cents, and for this amount the appellee has filed a remittitur. It is true, the plaintiff testified that some of the furniture for the value of which the suit was brought had been in use by himself and family for several years, and was worth as much at the time of its loss as he paid for it; and while there may be an air of improbability about this statement, we do not feel justified in holding that it was necessarily false. Just how much a particular article of furniture is worth to the family owning and using it may, in many instances, be difficult to determine; and in all instances value is largely a matter of opinion. Besides, it was not shown that the plaintiff paid full value for the articles when he bought them. If he bought them for half their value, it is not unreasonable to conclude that they were worth the amount he paid for them at the time they were destroyed.

The judgment will be reformed so as to reduce the plaintiff's recovery to 80 cents less than the amount stated in the judgment. However, as this excess is so slight, we do not think it should have any bearing on the question of costs; and therefore the costs of the appeal will be taxed against appellant.

Reformed and affirmed.

E. A. NOEL v. N. B. CLARK ET AL.

Decided January 16, 1901.

1.—Married Woman—Promissory Note—Purchase of Land.

A married woman is not liable upon a promissory note not given for necessaries, such as one executed jointly with her husband for the purchase money of land.

2.—Homestead—Pretended Sale—Vendor's Lien—Innocent Purchaser.

Homestead rights can not be asserted to defeat a vendor's lien, against a purchaser of the lien notes having no notice that the sale, which was absolute on its face, was merely to raise money and in effect a mortgage.

3.—Married Woman—Deed—Privy Acknowledgment—Omission of Christian Name.

A certificate of privy acknowledgment of a deed by a married woman is sufficient, though her Christian name is left blank, where it describes her as the wife.

4.—Note—Maturity—Limitation.

The act of a holder of vendor's lien notes not mature in indorsing them as canceled on his purchase of the property securing them at a trustee's sale under another incumbrance, if construed as declaring them then due for default in payment of interest, as by their terms he might do, had not that effect after such trustee's sale had been set aside by the court, and limitation did not then run till their maturity.

5.—Vendor's Lien—Homestead.

The wife's homestead rights did not attach to land conveyed to the husband, as against the holder of a vendor's lien note given on such conveyance, though the transaction was an attempt to mortgage the grantor's homestead under guise of a sale.

6.—Res Judicata—Notes—Vendor's Lien.

A judgment against the holder of vendor's lien notes, who had plead them as a defense to an action by the payor to recover the land, but had not asked judgment on them, was no bar to a subsequent suit by him to recover on the notes and foreclose the lien.

Appeal from McLennan, Nineteenth District. Tried below before Hon. Marshall Surratt.

John L. Dyer, for appellant.

J. B. Scarborough and *J. T. Sluder,* for appellees.

COLLARD, ASSOCIATE JUSTICE.—Suit filed September 26, 1899, by appellant against N. B. Clark and Ione Clark and Lewis and Mollie Clark, on two promissory notes, executed by N. B. and Ione, October 1, 1892, to Lewis Clark for $200 each, due respectively at three and four years, bearing 10 per cent per annum, and providing for payment of 10 per cent attorney's fees, each reciting that it was given as part consideration of a lot in the city of Waco, retaining vendor's lien to secure payment. Plaintiff averred that she purchased the notes for value before maturity, Lewis and Mollie Clark indorsing them. It is alleged by plaintiff that October 11, 1892, N. B. and Ione Clark conveyed the lot to Lewis and Mollie Clark, and they, Lewis and Mollie, assumed the payment of the two notes sued on, transferred to plaintiff the deed of N. B. and Ione to Lewis and Mollie retaining vendor's lien to secure the payment of the notes.

Plaintiff further alleged that on August 22, 1892, Lewis Clark, in purchasing the lot from Harry Chamberlain, as part payment, executed notes for $283.75, which last notes were purchased by plaintiff before maturity and were secured by deed of trust on the lot; that the trustee sold the lot, plaintiff becoming the purchaser, and in making the deed through inadvertance and mistake indorsed each of the $200 notes sued on as paid by the deed to the land "described by trustee, Jan. 2, 1894," the indorsement being made on the assumption that plaintiff had become the owner of the property by virtue of the conveyance of the trustee; but subsequently, in a cause in said District Court, styled Mollie Clark v. W. L. Burke and plaintiff, and on appeal to the Court of Civil

Appeals, it was held that the conveyance by the trustee was invalid because of failure of the trustee to sell as directed by the deed of trust, thus leaving the two notes for $200 each in full force in favor of plaintiff against Lewis and Mollie Clark, who had assumed their payment. Plaintiff prayed for judgment and foreclosure of his lien.

Defendants N. B. and Ione Clark pleaded statute of limitation of four years, upon the ground that when the land was reconveyed by them to Lewis and Mollie, it was understood by plaintiffs, N. B. and Ione and R. M. and H. C. Chamberlain, that the notes were to be canceled, the Chamberlains agreeing that they should be canceled and the lot reconveyed to Lewis and Mollie free therefrom, and averring that any stipulation to the contrary in the deed is fraudulent. Defendants N. B. and Ione also alleged that in their reconveyance to Lewis and Mollie they became sureties, and plaintiff extended the time of payment of the notes and thereby released them.

Defendant Mollie Clark set up her liability only as indorser of the notes, and that her liability as such had not been fixed by suit or protest, and that the debt sued on was the debt of N. B. and Ione, and that she had not promised to pay them in writing, pleading the statute of frauds. She also set up the two and four years statutes of limitations, and that the property was her homestead, that its conveyance was a scheme of her husband Lewis and N. B. Clark, plaintiff, and H. C. and R. M. Chamberlain, to enable them to borrow money on her home, and that she was deceived and defrauded into signing the deed by the parties, and received no part of the purchase money. She also pleads res adjudicata, based on her suit against W. L. Burke and plaintiff, in which neither N. B., Ione, nor Lewis Clark were parties.

The trial without jury resulted in judgment in favor of defendants, N. B., Ione, and Mollie Clark, and in favor of plaintiff against Lewis Clark for $767.58, being the amount due on the notes, foreclosure of vendor's lien on one-half undivided interest in the lot, awarding the other half of the lot to Mollie Clark, free from the lien. Plaintiff has appealed.

The findings of fact of the court below are as follows, and we find the same facts, except as herein stated:

"I find that on the 22d day of August, 1892, H. C. Chamberlain executed a deed to Lewis Clark to the lot on which foreclosure is herein sought, and on which said Clark then lived with his family, said Clark at the same time executing to Chamberlain two notes for about $141 each, in part payment for said lot, and a deed of trust on said lot to secure the payment of said notes, in which E. M. Ewing was made trustee.

"On the 1st day of October, 1892, Lewis Clark and his wife, Mollie Clark, who were still living on said lot and occupying the same as a homestead, conveyed the same to N. B. Clark, reciting a cash consideration in the deed and also the execution of two notes here sued upon for

$200 each, drawing 10 per cent per annum interest from date, interest payable semi-annually, and providing that upon default of payment of interest when due the holder thereof might, at his option, declare said notes due and proceed to collect the same, a lien being reserved in the face of said deed and notes to secure the same.

"Lewis Clark and his wife Mollie Clark indorsed said notes, and immediately, or within two or three days thereafter, transferred them for a valuable consideration to plaintiff, the negotiations for the transfer having been conducted on the part of plaintiff through her father, D. D. Noel, who paid plaintiff's money therefor and received said notes for her, plaintiff not having been consulted by her said father in the purchase, and having no knowledge thereof at the time. Lewis Clark and Mollie Clark left on the following night, taking their family, and went to the State of California, where Mollie left Lewis and her children fourteen months thereafter, and returned to Waco.

"On the 11th day of October, 1892, N. B. Clark and his wife Ione Clark reconveyed said lot to Lewis Clark and wife, Mollie Clark, the latter assuming the payment of the notes here sued on as part consideration for the reconveyance. This reconveyance was executed after Lewis and Mollie Clark had gone with their family to California and was forwarded to them by their agent, and was received by Mollie Clark in California.

"I find that the conveyance by Lewis Clark and his wife to N. B. Clark was not intended by the parties to that deed as an actual conveyance of the property, but was a scheme adopted by Lewis Clark and his wife to raise money on their homestead to go to California on, but that the plaintiff in this case, nor her father D. D. Noel, had no knowledge of said facts, but bought said notes believing said transaction to have been a bona fide conveyance of said lot. Thereafter, and before the 2d day of January, 1894, the plaintiff herein purchased the two $141 notes from Mayfield, as assignee thereof, and a short while prior to said date D. D. Noel, acting for his said daughter, handed an envelope containing said trust deed and the two $141 notes secured thereby, and also the two $200 notes herein sued upon, to the trustee E. M. Ewing, and instructed him to sell the property under said deed of trust and in accordance with its terms, and that, purporting to act under said deed of trust, the trustee sold said property on the 2d day of January, 1894, and it was bid in by the plaintiff for the sum of $800, and the trustee thereupon executed to the plaintiff a deed therefor, reciting therein that said two notes for $141 and the two notes herein sued upon had been canceled in payment for said land. The trustee Ewing, who was also an attorney at law, when Noel came in to get the deed to the property, suggested to Noel that as he had purchased the property the two notes here sued upon might as well be canceled, which suggestion was acquiesced in by Noel, and all four of the notes were indorsed, 'Paid by deed to the land,' written by the trustee, but not signed, and all were then returned to Noel by the trustee. No money was paid by Noel to the trus-

tee except expenses of sale, the notes being canceled in lieu of the amount bid.

"After Mollie Clark returned from California she moved back onto the land and was in possession thereof when sold, and when plaintiff attempted to secure possession under a judgment in his favor in a forcible entry and detainer proceeding, said Mollie Clark individually in cause number 6666 in this court, alleging that her husband refused to join her, sued plaintiff, alleging that the property was her homestead and praying an injunction restraining plaintiff from taking possession of said property under said forcible entry and detainer proceeding. She secured a temporary injunction, which was thereafter dissolved and plaintiff was placed in possession of the lot, and Mollie Clark thereafter amended her petition and sued to recover the land and for rents. To this plaintiff replied in his original answer, setting up the fact as to the notes held by him and the sale under the trust deed, her purchase and the conveyance to her by the trustee, and that the two $141 notes and also those here sued upon had been canceled in part payment for the land when conveyed to her by the trustee, and that the deed she received recited such cancellation and was so asserted by her in said suit until her deed was declared void by the Court of Civil Appeals on the 10th day of February, 1897, in an appeal in said cause. That cause came to final trial on the — day of ——, 1900, in this court and upon exception being sustained to a part of defendant Noel's answer, plaintiff herein, she then for the first time amended, filing a trial amendment, praying in the alternative for foreclosure of the two $141 notes, and judgment was entered therein that plaintiff, Mollie Clark, recover the land sued for and rents, and that defendant Noel, plaintiff herein, have foreclosure of the $141 notes. N. B. Clark, Ione Clark, nor Lewis Clark were parties to that suit. Prior to that time, on to wit, the 26th day of September, 1899, plaintiff had instituted this suit for a foreclosure of the $200 notes here sued upon, and said cause No. 6666 was also pending in this court, and defendant Mollie Clark moved in said cause to consolidate said two suits, which being assented to by plaintiff herein, said motion was withdrawn by said Mollie Clark, and hence said causes were not consolidated.

"Prior to March, 1898, Mollie Clark had sued her husband Lewis Clark for divorce, and about that time obtained judgment for divorce against her said husband Lewis Clark, who never moved to this State from California.

"This suit is by plaintiff Noel, to foreclose a lien on the $200 notes, in which N. B. Clark and his wife Ione, and Lewis Clark and Mollie Clark are made defendants.

"No interest was ever paid on these $200 notes, and two installments of interest were past due at the time the sale was made by the trustee and the notes marked canceled, and I find that the effect of plaintiff's acts in connection with that sale was to declare them then due under her option contained in the notes, although no such formal declaration

was made to that effect, and that the statute of limitation began to run against them at that time, viz., the 2d day of January, 1894.

"The deed of October 1, 1892, from Lewis and Mollie to N. B. Clark, recites: 'Know all men by these presents that we, Lewis Clark and his wife, —— Clark, for and in consideration of' etc., 'do sell and convey' etc., and was signed by Lewis Clark and Mollie Clark. The acknowledgment of Lewis Clark is in statutory form for the husband, and continues—'and also before me on this day personally appeared —— Clark, wife of the said Lewis Clark, known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said —— Clark, acknowledged such instrument to be her act and deed and declared that she had willingly signed the same for the purposes and considerations therein expressed and she did not wish to retract it.'"

Lewis and Mollie Clark both assumed the payment of the notes sued on, as stated in the deed reconveying the lot back to them by N. B. Clark and his wife Ione. The finding of the court that Mollie Clark was in possession of the lot when sold means when sold by the trustee under the deed of trust.

In suit No. 6666, all the notes for $141 each and $200 each were set up to defeat a recovery by Mollie Clark, Noel being in possession, and judgment was asked in the alternative for amount due by the notes for $141; but such judgment was not asked on the notes for $200 each now in suit. These last two notes were only set up in answer to the suit of Mollie Clark for the lot, to defeat a recovery, and judgment was rendered for her for the lot and rents, which was reduced by the amount found to be due on the two $141 notes for which judgment was rendered for Noel, leaving a balance due Mollie Clark of $6.10 excess of rent over the amount due on the $141 notes. No judgment was asked for the amount due on notes now in suit, and none was rendered as to that.

The history of the litigation in suit number 6666 may be briefly stated as follows: It was an injunction suit brought April 24, 1894, by Mollie Clark, her husband refusing to join her, claiming the lot in controversy as her homestead, against E. A. Noel, to enjoin the enforcement of judgment of forcible entry and detainer obtained by Mrs. Noel, to which Noel answered, setting up her purchase of the lot at trustee's sale, made by the trustee under a deed of trust executed by Lewis Clark to secure the two notes to Chamberlain for $141 each, deed by the trustee to the lot to Noel, the consideration being the same two notes and the two notes for $200 each, all of which four notes were canceled, whereby Noel became the owner of the lot, by virtue of which she recovered the lot in the forcible entry proceeding, and was awarded the possession of the same. Mollie Clark lost the suit, and judgment was awarded Noel for the lot on the ground of her purchase under the deed of trust by Lewis Clark; but that sale was set aside on appeal to the Court of Civil

Appeals of the Third Supreme Judicial District, on the ground that the lot was not advertised as required by the deed of trust by posting notices, the notices being published in a newspaper, whereupon Mollie Clark amended her suit to an action of trespass to try title November 7, 1899, Mrs. Noel setting up all the four notes, and claiming that she could not be ousted until the notes were paid, they each retaining a vendor's lien upon the lot for the purchase money. Both parties were satisfied and abided by the judgment of the Court of Civil Appeals, admitting that the sale under the trust deed was irregular and had been avoided by the judgment of the Court of Civil Appeals, which it is averred reinstated the parties in their rights as before the sale, reinstating the notes for $200 as they were before the sale, and reviving her rights thereunder, and she pleaded the notes, all four of them, as unpaid, to prevent a recovery by Mollie Clark in her action of trespass to try title. In the alternative she asked for judgment on the two notes for $141 each, foreclosure of lien and sale; but no such relief was asked as to the two $200 notes now in suit. That suit resulted in judgment for Mollie Clark for the lot, for Noel on the two notes for $141 as for debt, and for foreclosure; but the rents adjudged in favor of Mrs. Clark exceeding the amount due on the two $141 notes, judgment was rendered for Mrs. Clark for the lot and the excess of rent found to be due. So it is contended by Mrs. Noel that her two notes, the subject of the present suit, are unpaid, and are still due, and were not adjudged in the suit number 6666, which two notes were reinstated as they were at first and are binding, and hence there is no limitation to her action and no res adjudicata. The appellee insists that the matters in this suit have been adjudicated, or at least that res adjudicata will apply, and she files cross-assignments of error to this question. The court below decided against the plea of res adjudicata, but gave judgment for Mollie Clark upon the ground that plaintiff's right of foreclosure as to her one-half interest in the lot was barred by the statute of limitation, foreclosing as to Lewis Clark's half of the lot to pay plaintiff's debt against him.

The Clark women were all married women at the time of the transactions in which the suit originated.

Opinion.—It is not deemed necessary to follow the order of the assignments of error as presented, but we will discuss the questions raised by them in deciding the case.

1. In the first place we must say that there was no error in refusing a judgment on the notes sued on against the married women sued, as they could not bind themselves at the time of the transactions or become legally obligated to pay the notes which were not executed for necessaries to them or family or for the preservation of their separate estates. The transaction as to Mollie Clark was before her separation and divorce. A married woman can not bind herself by a promissory note, unless the transaction comes within the exceptions of the statute which

authorizes her to contract. This has been the recognized law of this State since the cases of Kavanaugh v. Brown, 1 Texas, 483 and 484, and Hollis v. Francois, 5 Texas, 195. Subsequent to these decisions there have been a number of decisions construing the statute and holding the same doctrine, and it is too well understood to require citation of authority. See Rev. Stats., arts. 2970, 1201; 1 W. & W. C. C., secs. 936 and 65; 30 Texas, 570; 10 Texas, 130; 18 Texas, 3; 42 Texas, 18; 43 Texas, 221; 53 Texas, 274; 62 Texas, 296; 63 Texas, 287; 53 Texas, 274; 64 Texas, 222; 71 Texas, 370.

2. But Lewis Clark and N. B. Clark could bind themselves, and they did do so. The notes of N. B. Clark to Lewis and wife were transferred to Mrs. Noel before maturity, before the reconveyance of N. B. Clark and wife back to Lewis and wife, the sale binding the latter to pay the two notes sued on to Mrs. Noel, who purchased the notes in good faith. They were vendor lien notes, and there was nothing known to Mrs. Noel or her agent of any fact which could defeat the validity of the notes in the hands of Mrs. Noel, as that it was a pretended sale to raise money on their homestead to enable Lewis and wife to move to California. The Noels knew nothing of this and were innocent purchasers in good faith without notice.

3. Mollie Clark objected to the introduction of the deed of herself and husband to N. B. Clark and wife, because of alleged insufficient acknowledgment by her. The acknowledgment of the parties is as follows:

"The State of Texas, County of McLennan.—Before me, R. M. Chamberlain, notary public of McLennan County, Texas, on this day personally appeared Lewis Clark, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed. Also before me on this day personally appeared —— Clark, wife of the said Lewis Clark, known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband and having the same fully explained to her, she, the said —— Clark, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and considerations therein expressed and that she wished not to retract it.

"Given under my hand and seal of office, the 7th day of October, 1892. [L. S.] R. M. Chamberlain, Notary Public McLennan Co., Tex."

The acknowledgment of Mollie Clark as a married woman is in form as required by the statute. Her given name is left blank, but it is stated that she is the wife of Lewis Clark, and the certificate so identifies her. That is sufficient, and there was no error in admitting the deed as her deed, and it would be sufficient in the conveyance of the homestead.

4. The statute of limitations had not barred either of the $200 notes at the time the suit was brought. The effect of the judgment of the

Court of Civil Appeals in setting aside the sale under the deed of trust to Noel, with which both parties are satisfied, and which stands as a judgment in full force, was to rescind the sale, the consideration paid by the cancellation of the notes and all matters relating to the sale, leaving the two notes now in suit in force as before, unpaid and unsatisfied. So they were not barred nor was any change effected in them by the sale.

5. Mollie Clark could acquire no homestead right in the premises against Noel's demand, under the facts, she being a party to a sale of the lot so far as the rights of Noel are involved.

6. The court below was not in error in refusing to hold that the proceedings and judgment in suit No. 6666 were res adjudicata of this suit. The notes in this suit were set up only to prevent a recovery of the land while they were unpaid, and no judgment was asked for the amount due by the notes for $200 each. Mollie Clark was not bound to pay the notes now sued on, and no legal judgment could have been rendered against her for the amount due on them, she being feme covert when they were executed; and Lewis Clark, who was bound to pay the notes, was not a party to that suit. Hence no judgment could have been rendered against him in that suit for the amount due on the notes. Nichols v. Dibrell, 61 Texas, 541; James v. James, 81 Texas, 381. If Lewis Clark had been a party to suit No. 6666, which was an action of trespass to try title, we would not be authorized to hold that the judgment would be res adjudicata of this suit to collect the notes for $200 each, as they were not in litigation except to prevent a recovery of the lot while unpaid, and hence were not adjudicated as to amount of debt due. Collateral questions are not involved in a judgment (Philipowski v. Spencer, 63 Texas, 607), and there was no necessity to take judgment on all the notes for the amount due. Howe v. Harding, 84 Texas, 76; James v. James, 81 Texas, 380, 381; 64 Texas, 541. The matter of debt due by the notes was not in issue and was not passed upon. 48 Texas, 508; 49 Texas, 572; 81 Texas, 380.

7. The court erred in decreeing one undivided half of the lot to Mollie Clark free from the lien, and foreclosing the lien on only the other half partitioned to Lewis Clark. The lien should have been foreclosed upon the whole lot, as against both Lewis and Mollie Clark. So the judgment of the lower court is reversed and here rendered for the amount found to be due as was found by the court, as against Lewis Clark, and foreclosing the lien, vendor's lien, for such amount on the whole of the lot against both Lewis and Mollie Clark.

Judgment of the lower court reversed, reformed and rendered.

OTTO LOCKE v INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Decided January 16, 1901.

1.—Railway—Obstructing Highway Crossing—Contributory Negligence—Assumed Risk—Question of Fact.

A highway crossing over a railway being obstructed by a hand car, plaintiff, in attempting to drive over the rails on one side of the planked crossing way, was thrown from his wagon and injured through his team taking fright at the car, on which some garments were hung. Held, that he had not assumed the risk as matter of law, and the right to recover if his act were not found to be one of contributory negligence should have been left to the jury.

2.—Opinion Evidence—Safety of Act.

Opinion evidence is not admissible as to the safety of an act where its character is determinable, not from expert skill, but from ordinary experience, as in the case of one driving over a railway track at a place other than the planked crossing.

3.—Damages—Evidence—Enjoyment of Life.

Loss of capacity for the enjoyment of the pleasures of life, though alleged as a basis for damages, is too vague an element to admit of evidence to sustain it.

Appeal from Comal. Tried below before Hon. H. Teichmueller.

F. J. Maier, for appellant.

S. R. Fisher and *J. H. Tallichet,* for appellee.

COLLARD, ASSOCIATE JUSTICE.—This suit was brought by Otto Locke against the appellee, the International & Great Northern Railroad Company, for damages for personal injuries to plaintiff, sustained at defendant's railroad crossing on a public road. The court below directed the jury to return a verdict for defendant, the railroad company, upon the ground that the court construed the evidence to mean that the act of defendant conplained of was not the proximate cause of the alleged injuries, and that plaintiff, with knowledge of whatever danger existed, assumed the risk and voluntarily exposed himself to such danger.

Verdict was returned for defendant, as directed by the court's charge, and judgment rendered accordingly, from which plaintiff has appealed.

The testimony of plaintiff is that he lives one mile west of New Braunfels, in the city limits; that he is a nurseryman and a farmer; that only one road leads from New Braunfels to his home. It crosses the bridge at Landa's mill, and then goes southward across defendant's railroad track, about one mile from town, in a lane. He was driving home from town with a wagon and team of two mules. There were no gates on either side of the railroad, so that he could not drive through the fence and thus go around the crossing, and there was no other way of reaching his home with the wagon and team, other than to drive over the crossing on the railroad. He had been to town with a load of trees,

and between 3 and 4 o'clock in the afternoon was driving back home. When he reached near the crossing he saw there was a handcar in the middle of the crossing on the side of the railroad track in the public road, on the side of the track nearest his house. The handcar stood only a few feet from the track in the traveled road in the lane. He saw the handcar when he entered the lane, and drove on until he got near the crossing and stopped about 20 feet from the crossing. He saw the section boss and hands working about 300 steps east, and motioned to them with his hand, but they took no notice, but he did not know whether they saw him or not. There was no room in the road to pass the handcar with his wagon. There were some bars of iron and tools on the ground, and on the right side of the crossing there was room enough to cross over the track, about sixteen feet from the handcar to the fence, and plaintiff drove across there over the railroad track. It was level ground, and he testified that he could drive over there without harm, or it appeared so to him. The crossing was about twelve feet wide, and to drive around the handcar he had to go off the crossing. His wagon was empty,—a good new farm wagon and strong team of mules and new harness, and he says it looked to him as if he could cross over; and the mules he says were gentle, and he drove around railroads daily with them, hauling trees to the depot for shipment, and he had handled mules and horses for many years and understood driving horses and mules. There were some clothes hanging on the handles of the handcar, coats or shirts or slickers; and as he drove over the track around the handcar, and as the mules got near it, the wind blew and waived the clothes. The mules reared and jumped to the right and forward, and the wheels of the wagon went over the rails and the jolt threw plaintiff out on the right side of the wagon, and the team went on about fifty yards, the hind wheel having caught the lines and stopped the team. The lines caught his wrist and he was dragged and injured as alleged. The line was not tied or wrapped around his wrist while he was driving but got wrapped as he got out. He was dragged until the team stopped. He says: "When I fell out of the wagon it skinned off my whole face. I was hurt in the back and one ear was nearly half off." He further relates his injuries, sufferings and confinement and inability to work as he formerly had,—budding, grafting, and the like.

The crossing he states was about twelve feet wide, and extended about ten feet on each side of the railroad track. There was no obstruction in the crossing when he drove to town after dinner. At the time of the accident he was sitting on the spring seat of the wagon, which was about twelve inches above the wagon bed or more. It was not a spring wagon, but a regular farm wagon, drawn by two mules. He could see the handcar when he got into the lane, but he went on to within thirty or forty feet of the track, as he states on cross-examination, but not quite to the crossing; but he could see the handcar and the tools lying on the side of it, and there was nothing that kept his mules from seeing it. With the

handcar where it was he could not drive on the plank crossing. There was ample room to drive between the fence and the crossing. Where he attemptd to cross, the ties were exposed outside the rails, with no dirt between them, but between the rails dirt was was filled in between the ties. The ties are six or seven inches thick, and the rails four or five inches, and he testified that he had to drive across the rail at that point over the obstruction the depth of the rail and the tie combined, and he saw the condition of affairs before he attempted to cross; saw the handcar and the slickers and his mules could see them, as there was nothing to obstruct the view. When he was in the act of crossing, he says on cross-examination, a sudden wind came up and flopped the objects on the handcar and made the mules scare, when they jerked off to the right so violently as to throw him off on the ground. He also testified that he could have stopped there and come back to town, but that he had no time to do that.

The testimony of Max Fricker corroborates plaintiff's testimony as to the drive across the track and the accident. A train passed on the road at this point about half an hour before the accident, and a second train passed about the time plaintiff's team stopped and was tied, but the train was not in sight when the injury occurred, and had nothing to do with the injury. The testimony does not show but that the handcar might have been put off the track at other points close by the crossing.

Opinion.—1. The assignment of error to the effect that the testimony warranted the submission of the case to the jury and that the court erred in peremptorily directing a verdict for defendant, is well taken and is sustained. The question as to negligence of defendant in placing the handcar across the public road, so as to obstruct the travel and interfere with plaintiff's right to the use of the dirt road and bridge, and the question as to whether or not he was guilty of contributory negligence, under the circumstances, in attempting to cross the railroad track where there was no bridge, were questions of fact for the jury and not for the court to decide.

A jury would be authorized to find that defendant had no right to so obstruct the public road with its handcar as to prevent its use by plaintiff with his wagon and team, and that it was guilty of negligence in so doing. Yet it is true, if plaintiff was also guilty of negligence under the circumstances, which contributed to his injuries, he could not recover, notwithstanding the company may have committed a wrong in obstructing the road. But this question should have been left to the jury. Judge GAINES, now Chief Justice of the Supreme Court, in the case of Railway v. Gasscamp, 69 Texas, 547, says: "According to the rule in this court, in order that an act shall be negligent per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that we can say, without hesitation or doubt, that no careful person would have committed it." The same opinion, after discussion of the law as decided in other courts, proceeds:

"Whether the act be negligent or not depends upon the circumstances attending it, and the question is for the determination of the jury."

The care required of plaintiff was ordinary care and prudence, and this was for the jury to determine from the facts and circumstances under proper charge of the court submitting the question to them. "The test is, what would a man of ordinary prudence have done under the same circumstances." Railway v. Able, 72 Texas, 155, 156; Railway v. Bridges, 16 Texas Civ. App., 64; Conzales v. City of Galveston, 84 Texas, 6. (The citation in the last above case to Railway v. Clark, 81 Texas, 48, is an error; it should be O'Connor v. Andrews, 81 Texas, 36.)

Appellant has cited a great number of cases decided by the courts of this State and of other States, many of which are pertinent to the question and sustain his assignment of error, but it is not necessary to review them, as we are content with what has been said and the authorities we have cited.

2. There was no error in excluding the testimony of the opinion of witness Fritz Gerloff, that one could with safety make the drive across the railroad track where plaintiff went over, he being an experienced driver, having gentle mules and a good wagon. The opinion of a witness, even though he may be competent to testify as an expert, as to matters in the ordinary experience of men, is not admissible. The jury is deemed fully capable of deciding the question without the aid of opinion witnesses. All the facts were before them and it was their duty to decide whether or not plaintiff was guilty of contributory negligence and might have undertaken to drive over the railroad track with safety with his wagon and mules. Shelley v. City of Austin, 74 Texas, 611, 612.

3. There was no error in excluding the testimony of plaintiff as to loss of capacity for "the enjoyment of pleasures of life." The matter, though pleaded, is too vague to furnish any information upon a definite subject upon which damages would arise or be allowed.

Because of the error in the charge instructing the jury to find for defendant, the judgment of the lower court is reversed and the cause remanded for trial.

Reversed and remanded.

J. V. McCORKLE ET AL. v. OLLIE McCORKLE ET AL.

Decided January 23, 1901.

Estates of Decedents—Distribution—Homestead—Jurisdiction.

The district court has no original jurisdiction over a suit by the widow of a decedent and her children against his children by a former marriage to recover the homestead, communty property of such first marriage, and their distributive share in the estate, so long as administration on such estate is pending in the county court, which has jurisdiction in probate over all such matters.

Appeal from McLennan, Ninteenth District. Tried below before Hon. Marshall Surratt.

J. S. Fitzhugh and *D. A. Kelley,* for appellants.

J. B. Scarborough, for appellees.

COLLARD, ASSOCIATE JUSTICE.—This suit was brought in the District Court of McLennan County, the 20th day of December, 1897, by Ollie McCorkle, as surviving widow of A. M. McCorkle, deceased, and for her three minor children, Grace, Pearl, and Myrtle, as their next friend, against appellants J. V. McCorkle, Etta Warren and her husband John Warren, R. L. McCorkle, Arizona McCorkle, surviving widow of John McCorkle, deceased, and his two minor children Nola and J. Bryan McCorkle, for recovery of alleged interests in the estate of A. M. McCorkle, which is alleged to embrace community property of A. M. McCorkle and his first deceased wife Louisa McCorkle, the mother of defendants, and also to embrace estate of A. M. McCorkle and his surviving wife, plaintiff Ollie McCorkle. The property embraced about 700 acres of land in McLennan County, on which it is alleged plaintiff had a homestead interest of 200 acres of land, which is described by metes and bounds, and also a one-third life estate in other property of A. M. McCorkle deceased, also a one-half interest in a dry goods store in Valley Mills, a house and three lots in Valley Mills, 25 head of horses and mules, 40 head of cattle, and interest in crops of 1897 and 1898, and accounts due deceased.

P. Downing and W. C. Railey were also made parties defendant, but suit was dismissed as to them, and they are not parties to this appeal. P. Downing filed a plea to the jurisdiction the 6th day of December, 1899, properly verified, alleging that the estate of A. M. McCorkle is in process of administration in Bosque County and unclosed, and it was shown by testimony that the final account of J. V. McCorkle, the executor, had not been filed and that there were debts unpaid against the estate amounting to $500 to $700, embracing costs and attorney's fees and some few other debts. Letters were issued to J. V. McCorkle as executor of the estate of deceased in March, 1897, from the County Court of Bosque County, and it was proved that the estate was still open and pending

under the orders of the probate court of Bosque County, and that at the time this suit was instituted very few of the debts against the estate had been paid, but that since then nearly all the debts had been paid, there remaining unpaid between $500 and $800, consisting of costs and attorneys' fees, commissions due the executor, not paid because the executor had not funds to pay them, and property of the estate would have to be sold to pay them. All the personal property of the estate had been sold except sufficient stock and implements to run the farm, and if they were sold they would not sell for enough to pay the estate out of debt. The item of attorneys fees, $500, was incurred in defense of this suit.

It seems the court overruled the plea in abatement and set it aside and held the case for trial, to which defendants excepted. All the defendants, including J. V. McCorkle, the executor, December 6, 1899, answered, J. V. McCorkle setting up that he is the executor of the will of deceased, and that the estate is being administered in Bosque County, and that the administration is still pending; that deceased was the husband of plaintiff Ollie McCorkle and the father of the other plaintiffs; that the suit is for an interest in the estate while it is being administered in the probate court of Bosque County; wherefore "these defendants say" that the District Court of McLennan County has no jurisdiction, and the suit ought to abate and to abide by the result of the administration. This answer is sworn to.

Further answering, defendants deny all the allegations of the petition, and say that they are not guilty, etc.; and answering specially, "but not waiving their rights under foregoing pleas," matters are set up which relate to the defense of the suit on the merits, but, believing that the plea to the jurisdiction should have been sustained, it is not necessary to state other issues.

May 26, 1900, the cause came on for trial and plaintiffs dismissed as to defendants Railey and Downing and the court overruled the plea in abatement. The judgment on this part of the case is as follows: The plea in abatement by the defendants having been presented and evidence heard at former term of court and overruled, and statement of evidence filed, the same was again presented and overruled. Defendants duly excepted to the ruling and it is before us on assignments of error. We have already made a statement of the facts in evidence on the trial of the plea in abatement to the jurisdiction. Trial judgment was had on the 23d day of May, 1900, in District Court of McLennan County, partitioning the estate of A. M. McCorkle among his heirs and the heirs of the first wife, granting to plaintiff, the last wife, judgment for $2144.42, and setting aside to her 200 acres of land as a homestead, describing it, all at defendant's costs, including fee of $500 to her attorneys, which was adjudged a claim against the estate for legal services in this suit.

We review the facts in evidence on the plea in abatement to the jurisdiction of the court, and find and state as follows: A. M. McCorkle's first wife, Louisa, died in 1887, and defendants are the children and descendants of that marriage. He was again married to plaintiff Ollie,

and there are minor children of that marriage represented in this suit by their mother, who brought this suit in McLennan County as surviving wife of deceased. He, A. M. McCorkle, died in Bosque County, the 25th of February, 1897. Defendant J. V. McCorkle is a son by the first marriage, and letters were issued to him as executor of the estate in Bosque County in March, 1897, and the facts show that the estate has not been fully administered and that the administration is still pending in Bosque County; that the executor had filed no final account in the estate; and that there had been no partition or settlement of the estate in the probate court. The facts show that there are some small debts due by the estate besides the attorneys' fees of $500 allowed by the court trying this case to the attorneys of plaintiffs. The trial court ordered partition of the estate, and awarded to plaintiffs property and judgment as before stated. Defendants have appealed.

Opinion.—Assignments of error by appellants authorize the consideration and decision of the matters below considered.

The court below erred in refusing to sustain the plea to the jurisdiction of the District Court and in entertaining the case and rendering judgment as stated. The jurisdiction of the County Court of Bosque County, in which letters were granted and in which the administration under the will was pending, extended over the matters to be decided, and that jurisdiction could not be interfered with by the District Court. The Constitution and statutes of this State confer the jurisdiction attempted to be invoked upon the county court as a court of probate. Section 16, article 5, of the Constitution confers this jurisdiction as follows: "The county court shall have the general jurisdiction of a probate court; they shall probate wills; appoint guardians of minors; * * * grant letters testamentary and of administration; settle accounts of executors; transact all business appertaining to deceased persons, minors, etc., including the settlement, partition, and distribution of estates of deceased persons."

Ample provision is made in our probate statutes to enforce the Constitution. One entire chapter of the revised statutes is devoted to partition and distribution of estates (chapter 25, Revised Statutes), and another chapter is given to final settlements of estates of deceased persons by the administrator or executor. Id., chap. 26. The county court is clothed with full powers to administer estates of deceased persons, and all the matters adjudged by the district court in this case properly belonged to the probate jurisdiction of the county court and not of the district court. If the estate should have been closed, and the executor delayed unnecessarily to file his accounts and call for final settlement, he could be compelled to make final settlement by the court upon application of "any person interested in the estate." Rev. Stats., 2193. The district court could not take such jurisdiction when the probate court is open and qualified to act. The district court has appellate jurisdiction

only. Heath v. Layne, 62 Texas, 690; Buchanan v. Bilger, 64 Texas, 591, 592; see also 17 Texas, 541; 24 Texas, 661; 25 Texas, 231.

The County Court, where the administration under the will was pending, had full power under the statute to set apart the homestead to the plaintiff, as well as all the allowances she claimed. As to setting apart homestead to surviving widow and children and other exemptions the probate statute is full and sufficient, and it is made the duty of the probate judge to grant orders for these purposes. See the whole of chapter 18 of the Revised Statutes. Another chapter is given to allowances to widows and minor children. Rev. Stats., chap. 17, arts. 2037, et seq. The County Court for probate purposes of Bosque County, where the administration was pending, was the only court to grant the relief and decrees prayed for by plaintiffs and the District Court had no such power, by original jurisdiction.

The facts are fully developed by the evidence on the subject decided, and we believe it is our duty to reverse the judgment of the District Court and dismiss the cause, leaving all other matters litigated, upon proper application, to the County Court of Bosque County, where the estate is in process of administration, and yet having the power to act in the premises.

The judgment of the lower court is reversed and the cause dismissed.

Reversed and dismissed.

Writ of error refused.

KATE WHITE ET AL. v. MRS. JANE HOLMAN.

Decided January 23, 1901.

1.—Will—Recital—Heirship—Adoption—Declarations Against Interest.

A recital in a will that one was the adopted daughter of the deceased husband of testatrix, was evidence as against another to whom she devised all her real estate, described as a half interest in specific property which had been community estate, that the husband's community half interest had passed by inheritance to such adopted daughter.

2.—Same—Best Evidence—Failure to Object to Secondary.

A recital of the adoption of an heir, in a will introduced without objection, was sufficient evidence of that fact, though the adoption papers might be the best evidence.

3.—Same—Fact Case.

A husband and afterwards the wife dying without children, the latter devised to her sister "all the land I now own," which "consists of an undivided one-half interest" in land specifically described, which had been community property of herself and the deceased husband; she also bequeathed all her personal property to H., "the adopted daughter of my deceased husband." Held, that the recital of such adoption, being a declaration against the testatrix's interest, was evidence of the fact as against the devisee of the real property, and showed that the adopted daughter was entitled, as heir of the husband, to one-half of the land; also, if it was only secondary and the adoption papers the best evidence, the admission of the will without objection on that ground cured that defect in the proof.

Error from Lampasas. Tried below before Hon. John M. Furman.

Walter Acker, for plaintiffs in error.

W. B. Abney, for defendant in error.

COLLARD, ASSOCIATE JUSTICE.—Plaintiffs in error have furnished this court with a correct statement of the nature and result of the suit, which we adopt as follows:

"Plaintiffs in error Kate White and her husband, Dave White, brought suit against Jane Holman and her husband, Mark Holman, in the usual form of trespass to try title to 181 acres of the Seaborn Berry survey, in Burnet and Lampasas counties, and particularly described in the petition.

"Mark Holman having died on the 5th day of May, 1900, Jane Holman answered by general exception, general denial, plea of not guilty, five and ten years limitation, and cross-action in form of trespass to try title, claiming all the land sued for. The suit was dismissed as to Mark Holman on May 8th, and on May 10th plaintiffs filed their answer to the cross-action of defendant, Jane Holman, consisting of general denial and plea of not guilty, and took nonsuit in their original action.

"The trial was without a jury, and resulted in judgment in favor of defendant Jane Holman for all the land, to which plaintiffs excepted and gave notice of apppeal to this court. Plaintiffs filed motion for new trial May 12th, supported by affidavits and exhibit therein referred to and made a part of the motion, which was controverted by affidavit of defendant's attorney.

The motion for new trial was overruled, to which plaintiffs excepted and gave notice of appeal, and an order was entered allowing ten days after adjournment in which to file statement of facts. Plaintiffs failed to perfect their appeal, and on June 16th filed their petition for writ of error and supersedeas and writ of error and supersedeas bond, upon which citation in error and supersedeas was issued and served upon same day. On June 23, 1900, plaintiffs filed their assignment of error. The judge filed no conclusions of fact or of law."

We find the facts as follows: The land in controversy was the community property of J. W. Hinkle and his wife, S. A. Hinkle. He died several years before his wife, leaving no child or descendants. His surviving wife married a man by the name of Woods, and died leaving no child or descendants. The land, 131 and 50 acres, was acquired by purchase by Hinkle during the marriage with Sarah A. Hinkle, and all of the land had been inclosed for ten years prior to April 20, 1900.

Mrs. S. A. Woods, formerly Mrs. Hinkle, left a will which was duly probated in Lampasas County, the 11th day of April, 1899, in which will she devised to her sister Jane E. Holman as follows: "All of my real estate of which I may be seized at my death; all the land I now own and which I wish to bequeath to her, the said Jane Holman, consists in

an undivided one-half interest in the following described tract of land, to wit:" [Here follows description of the entire 180 acres of land in suit, and then the will proceeds]: "Of which I own an undivided half interest, and which half interest is hereby bequeathed and devised to the said Jane Holman." The next clause in the will is: "I will and bequeath to Katie Hinkle, the adopted daughter of my deceased husband J. W. Hinkle, all the personal property of whatever kind I may own at my death, to include any and all crops growing or gathered, all stock of any kind, household effects and kitchen furniture, and one Estey organ."

The adoption paper of Kate White as daughter and heir was not offered in evidence on the trial, because proper notice had not been given that it would be offered. It was presented in the motion for a new trial, and is in compliance with the statute (Revised Statutes, articles 1, 2,) relating to adoption of a child and heir, and filed for record. As an adopted child, Kate would inherit one undivided half of the estate in suit. The will was offered and read in evidence by defendants.

Opinion.—We believe the first assignment of error presented by plaintiffs in error, Kate White and husband, should be sustained, because, as insisted in the assignment, it appears from the evidence that she is the adopted daughter and heir of J. W. Hinkle, who died leaving no natural child or descendants. Rev. Stats., arts. 1, 2, and sec. 2, art 1689. The section of the article of the statute last cited provides that "if deceased have no child or children or their descendants, then the surviving husband or wife shall be entitled to all the personal estate and to one-half of the land of the intestate, and the other half shall pass and be inherited according to the rules of descent and distribution." The articles 1 and 2 of the statute referred to provide that the adoption of another as legal heir entitles the adopted person to all the rights and privileges, both in law and equity, of a legal heir of the party adopting him; provided, that if the party adopting such heir have at the time of such adoption or shall thereafter have a child begotten in lawful wedlock, such adopted heir shall in no case inherit more than one-fourth of the estate of the party adopting him. The proviso, it will be seen, has no application to the facts of this case, and if Kate was adopted by J. W. Hinkle she would inherit an only child's part of the land estate, which would be one-half of the community realty.

The will of S. A. Woods, formerly Hinkle, expressly limited the devise to her sister to one-half of the land, and recognized the plaintiff, Kate, as having been adopted by J. W. Hinkle, her former husband, and she only claimed one-half of the realty which she devised to Jane Holman, her sister, all showing conclusively that she, the testator, acknowledged the adoption, approved and affirmed the rights of plaintiff Kate as the heir of the deceased husband, and that she, Kate, was entitled to his half of the community landed estate. The admission of

such facts is evidenced in writing in the will; it is an admission solemnly made against the interest of the testatrix, and is not disputed by any fact in proof, the devisee under the will claiming under the will. Curtis v. Wilson, 2 Texas Civ. App., 646, 21 S. W. Rep., 787, 788; 2 Texas Civ. App., 646; 1 Greenl. on Ev., secs. 103, 104; Eckford v. Knox, 67 Texas, 201-203; Taylor v. Deseve, 81 Texas, 246; Moore v. Bryant, 10 Texas Civ. App., 131, 31 S. W. Rep., 223. The admission is binding upon the devisee claiming under the will by which she has title to one-half of the land.

The fact that the adoption papers were the best evidence of the heirship of plaintiff does not arise. The will was offered and read in evidence by defendant, and no objection was made that the clause stated above in the will was inadmissible without accounting for the original. The only question is, what was the effect of the evidence? As to that we hold that it established the fact of adoption, which would entitle the adopted child to the right of inheritance. Heirship is a necessary consequence of adoption. The adoption of one as a child makes the child an heir of the person adopting. There is no other kind of adoption of a child known to our statute, and hence the adoption fixes heirship. The adoption constitutes the child an heir. Taylor v. Deseve, supra. We do not consider the questions raised by the motion for a new trial, in which the adoption papers were filed, making Kate the adopted child and heir of Hinkle, all in form and filed as required by the statute, as we hold that the adoption was proved. The proof was sufficient to establish the fact of adoption, and the judgment ought to be reversed and here rendered in favor of plaintiff for one undivided half of the land in suit, and it is so ordered, and judgment is so rendered by this court.

Reversed and rendered.

J. R. O. DAVIS v. HOMER WELLS.

Decided January 30, 1901.

1.—Libel—Privileged Communication—Duty to Make.

A communication, to be privileged, must be made by one who rests under some duty, public or private, to the party to whom the statement is made, either legal, moral or social.

2.—Same—Question of Law or of Fact.

Where the duty to furnish the statement is so well defined that the law itself gives character to it, the court should determine that the duty existed, as matter of law, otherwise the question of privilege is one of fact, as to the communication here shown.

3.—Privileged Communication—Malice—Good Faith.

Express malice and want of good faith are not necessarily the same, and the existence of either or both should be left to the jury where there is any evidence warranting their submission.

Appeal from McLennan, Fifty-fourth District. Tried below before Hon. Sam R. Scott.

Edwin W. Hander, for appellant.

Jenkins & Harrison, for appellee.

FISHER, CHIEF JUSTICE.—This is an action for libel brought by the appellant against the appellee, based upon the following letter:

"WACO, TEX., March 14, 1898.

"Mr. R. L. Rosebrough & Son, St. Louis:

"Gents.—There is a man here by the name of J. O. Davis and who has a nice lot of designs who is selling work through this country in your name, and then going from shop to shop and has his work done where he can have it done the cheapest and no reputable house will figure with him. I will say your reputation is not benefited in any way by the class of work he has done. There is a small shop owned here by O. J. Miller, who is doing some work for him. Mr. Davis worked for me last year. This is in confidence to you. You may investigate and find out for yourself. Respectfully,

"HOMER WELLS."

The final result of the foregoing letter was injurious to plaintiff, who was at the time soliciting orders for Rosebrough & Son in the marble and monument business, afterwards incorporated as the Rosebrough Monument Company, and it might be inferred from the testimoney that this communication finally caused his discharge from the monument company. The court instructed the jury that the letter alleged to be libelous was a privileged communication, and the plaintiff having failed to show malice upon the part of defendant in the publication, to return a verdict for defendant. This was done, and from the judgment rendered this appeal is taken.

The trial court erred in instructing the jury that the letter was a privileged communication, and that there was no evidence of malice. Generally, it is a question of law whether a communication is privileged, but cases may arise where the character of communication becomes a mixed question of law and fact, and in such an instance, it is the duty of the trial court to submit the question to the jury, whether the alleged libelous matter is privileged. "A communication made in good faith upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged." 13 Am. and Eng. Enc. of Law, 1 ed., 403.

There are expressions found in some of the opinions of the courts of this State, which when closely scrutinized will be found to be dicta, to the effect that a communication, to become privileged, need not be made by one who rests under some duty to the party to whom the statement is made. These expressions are, in our opinion, opposed to the

great weight of authority; especially to the rule announced by the courts of England, which have so frequently construed the common law upon this subject. The true rule, as we understand it, is correctly stated in the above quotation from the American and English Encyclopedia of Law. Cases might arise in which the duty of the party furnishing the statement is so well defined that the law itself gives character to it; and in such a case the court should determine that the duty existed, as a matter of law, but such is not the case here. Whether the appellee rested under a duty to the parties to whom he addressed the letter is a question of fact to be submitted to and considered by the jury. The evidence does not disclose any relationship of affinity or consanguinity between the appellee and Rosebrough & Son, nor does it disclose the existence of a friendship between such parties which would rest upon one the moral duty to protect the other; nor does it appear that any fiduciary or business relationship existed between these parties. It is possible that upon another trial some evidence bearing upon this question may be offered, but in the absence of some such fact showing that the party making the communication rested under a duty to the other, he must be regarded as a stranger who officiously intermeddles with the business of a third party.

The information furnished by the letter is not one in which the public or the welfare of society is interested, but wholly relates to transactions of a private nature.

If it should be determined that the communication is privileged, exemption from liability will not exist if it was made upon express malice or with a want of good faith. There is some evidence in the record which would warrant the submission of these issues to the jury. We intimate no opinion as to the weight of that testimony, but are content with calling the court's attention to the fact that there is some evidence which should be considered by the jury bearing upon the question of malice or the want of good faith of the party making the communication. We distinguish malice from the want of good faith, because the sense in which they are here used does not necessarily imply that they have the same meaning, and the court in charging the jury should instruct them that if the communication was made upon express malice, or if there was a want of good faith upon the part of the party making it, in neither instance would its privileged character protect him. Express malice would possibly include a want of good faith; but a want of good faith does not necessarily imply that the statement was made upon express malice. The statement may be made without the party entertaining any express malice towards the other, but still there may be circumstances that would indicate a want of good faith in making it.

For the errors pointed out, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

FRANK C. WEDIG v. SAN ANTONIO BREWING ASSOCIATION ET AL.

Decided January 30, 1901.

Mortgage—Sequestration—Damages.

A mortgagee who has the right under his contract to take possession of the mortgaged property on default in payment of the debt secured, can not be held liable for damages by taking such property by writ of sequestration, though it be alleged that the writ was wrongfully procured, on false affidavit, and for the purpose of injuring the mortgagor, since he has done no more by the writ than his contract gave him the right to do without it.

Appeal from Travis. Tried below before Hon. R. E. Brooks.

Ben P. Rogers and *Fred Carleton,* for appellant.

Upson & Newton, Hogg & Robertson, and *Fred C. Von Rosenberg,* for appellees.

COLLARD, ASSOCIATE JUSTICE.—This is an action for damages for alleged wrongful and malicious suing out and levy of a writ of sequestration. The petition is as follows.

"Your petitioner, Frank C. Wedig, a resident citizen of the county of Travis and State of Texas, who will hereinafter be styled plaintiff, brings this suit and files this petition against P. L. Meyer, a resident citizen of the county of Travis and State of Texas, and the San Antonio Brewing Association, a private corporation, created under the laws of the State of Texas having its principal office in the city of San Antonio, in the county of Bexar, in the State of Texas, its president being C. Kohler, who resides in said last named county and State, and having a duly authorized agent in the city of Austin, in said county of Travis, such agent being the said defendant P. L. Meyer, who will hereinafter be styled defendants, and for cause of action plaintiff alleges:

"1. That on or about the 21st day of June, 1899, plaintiff was engaged in the business and occupation of a retail liquor dealer in the city of Austin, in the county of Travis and State of Texas, and as such dealer, and as part of his stock in trade, and as necessary for the transaction of his said business, had and owned certain fixtures and furniture of the reasonable and just value of thirteen hundred and fifty dollars, and consisting in part of the following articles: One counter, one back shelf, one mirror, one showcase, four electric fans, complete, four wine-rooms, one storeroom, one iron safe, one partition, four tables, eighteen chairs, one foot railing, lot of glassware, and lot of silver-plated bar spoons and bar utensils, all of which said articles were used in the business and occupation of plaintiff as a retail liquor dealer in that certain storeroom and building situated at number 701 Congress avenue, on corner of East Seventh street, in the city of Austin, aforesaid, on or about the 21st day of June, 1899, and for more than twenty months prior thereto.

"2. That on the 12th day of November, 1897, the plaintiff being indebted to the defendant, the San Antonio Brewing Association, in the sum of fifteen hundred dollars, this plaintiff executed his promissory note in said sum of money, due one day after date, with interest from date at the rate of seven per cent per annum, to the said San Antonio Brewing Association.

"3. That on said 12th day of November, 1897, in order to secure the just and full payment of the aforesaid promissory note for fifteen hundred dollars and interest, plaintiff herein made, executed, and delivered to the defendant, the San Antonio Brewing Association, a chattel mortgage, a copy of which is hereto annexed, exhibit A, and prayed to be taken and considered as a part of this petition, whereby plaintiff conveyed to the defendant as a security the personal property, with some others, which is hereinbefore described, and which was then situated in the aforesaid building and saloon situated at No. 701 Congress avenue, aforesaid, which said chattel mortgage, among other things, stipulated that the plaintiff promised to pay off the note secured by mortgage at the rate of not less than fifty dollars per month from date.

"4. That on or about the 1st day of July, 1898, plaintiff, for valuable consideration, made, executed, and delivered to defendant, the San Antonio Brewing Association, his certain promissory note for the sum of six hundred dollars, due one day after date.

"5. That on or about the 16th day of July, 1898, in order to secure the full payment of the aforesaid note for six hundred dollars and interest, plaintiff herein made, executed, and delivered unto the defendant, the San Antonio Brewing Association, a certain chattel mortgage (a copy of which is herein annexed marked exhibit B, and prayed to be taken and considered as a part of this petition), whereby plaintiff mortgaged to defendant, the San Antonio Brewing Association, those certain retail liquor dealer licenses, for State, county, and city, which were used in plaintiff's said place of business, as hereinbefore described, as well as all other personal property which was then or might be thereafter placed therein.

"6. That on or about the 21st day of June, 1899, defendant, the San Antonio Brewing Association, filed suit in the County Court of Travis County, Texas, cause No. 3219, against the plaintiff, for balance due on the two aforesaid promissory notes and to foreclose its lien on the personal property set out and described in the two aforesaid chattel mortgages, alleging a balance to be due on same of the sum of eight hundred and eighty dollars, together with interest and attorney's fees, which allegation, so contained in said suit, plaintiff now avers not to be the truth, said plaintiff herein not being at that time indebted to the said San Antonio Brewing Association in any such amount, although he admits that he was at the date of the filing of said suit indebted to said brewing association in some sum, but he denies that the same amounted to the sum of eight hundred dollars, but that such indebtedness, if any, did not and does not amount to near as much.

"7. That on the said 21st day of June, 1899, the defendant, the San Antonio Brewing Association, conspiring and confederating with the said defendant P. L. Meyer to injure plaintiff and to destroy his business credit and reputation, procured the said defendant P. L. Meyer to make and file his, the said P. L. Meyer's, affidavit for a writ of sequestration in said cause against this plaintiff, in which said affidavit he, the said P. L. Meyer, did swear that the said sum of eight hundred and eight dollars, with interest and attorney's fees, was due and owing to the said San Antonio Brewing Association by this plaintiff, that the said association had a lien or mortgage on the aforesaid personal property to secure the same, and that the San Antonio Brewing Association was entitled to the possession of said personal property, and that it feared that this plaintiff, who was in possession of said property, would injure, ill treat, waste or destroy such property during the pendency of such suit, and further set up and alleged in said affidavit the value of the property on which said lien was claimed to exist to be the sum of five hundred and twenty-nine dollars; and this plaintiff now alleges that said affidavit was untrue and false in these particulars, viz., that he was indebted to said association in the sum of eight hundred and eight dollars, exclusive of interest and attorney's fees, the truth being, as plaintiff here alleges, that there was due, if anything, a very small sum upon the said two notes and chattel mortgages, and that the value of the personal property mortgaged to said association by this plaintiff was on the said 21st day of June, 1899, the sum of thirteen hundred and fifty dollars, and plaintiff alleges that the statement in said affidavit contained, that this plaintiff would injure, ill treat, waste or destroy such personal property included in said two mortgages during the pendency of said suit in the County Court of Travis County, was utterly false, and plaintiff further alleges that said statement in said affidavit was made by both of said defendants with full knowledge of its falsity and with intent on the part of both of said defendants to injure this plaintiff in his business reputation and credit.

"8. That on the said 21st day of June, 1899, in said cause No. 3219, the said San Antonio Brewing Association also filed in said cause its bond with security in the sum of eleven hundred dollars, and thereupon was issued in said cause upon its demand a writ of sequestration directed to the sheriff or any constable of Travis County, directing him to take into his possession the personal property described in the chattel mortgage dated the 12th day of November, 1897, which said writ was duly executed by the sheriff of Travis County on the 21st day of June, 1899, by seizing the before described personal property and taking it out of the possession of this plaintiff, and which said personal property was afterwards, on July 4, 1899, replevied by the defendant, the San Antonio Brewing Association, and the same is now in its possession, and being used by it for its use and benefit.

"9. That this plaintiff alleges that by reason of the aforesaid wrongful issuance and levy of said writ of sequestration and the seizure of

the aforesaid personal property, he has been deprived of the use and benefit of same, wherefor and whereby he has been prevented from carrying on his occupation and trade as a liquor dealer, to his actual damage five thousand dollars.

"10. That this plaintiff alleges that he has been a resident of the city of Austin aforesaid for more than twenty years, has been during all of said period actively engaged in business, and during all said time enjoyed a good reputation for honesty and fair dealing, and had, up to said 21st day of June, 1899, and the issuance and levy of said writ of sequestration, a good credit and standing among business men and the commercial world generally, but that, since the said levy and the seizure of said personal property, his said credit and commercial standing has been, among his neighbors, friends, and the commercial world specially and generally, seriously impaired and destroyed by reason of the levy and seizure aforesaid, and his ability to pursue his said occupation of saloon keeper and liquor dealer totally destroyed.

"11. That the said defendants caused the issuance and levy of the aforesaid writ of sequestration maliciously and without probable cause, and with the intent on the part of both of them to injure plaintiff in his business, credit, and reputation, whereby he says he is entitled to a judgment for punitory and exemplary damages against both of said defendants in the sum of ten thousand dollars, in which sum, in addition to his actual damages, he alleges he has been damaged and injured.

"12. That by reason of the levy of said writ of sequestration, wrongfully and without probable cause, upon the said personal property of plaintiff, and his dispossession of the same, and by all the facts and circumstances as alleged hereinbefore by plaintiff, he has been actually damaged and injured by defendants in the sum of five thousand dollars, for which sum he now prays judgment against both of said defendants.

"Premises considered, plaintiff prays for process pursuant to law, and that on final trial of this cause he may have judgment against defendants, the San Antonio Brewing Association and P. L. Meyer, for the sum of five thousand dollars, actual damages, and for the further sum of ten thousand dollars as exemplary or punitory damages, for costs and for general and special relief," etc.

Exhibit A, referred to in the petition and attached thereto, is as follows:

[Exhibit A.]

"The State of Texas, County of Travis:

"Know all men by these presents that I, Frank C. Wedig, of the State of Texas and county of Travis, for and in consideration of one dollar to me in hand paid and the further consideration hereinafter set forth, have sold, transferred, and delivered, and by these presents do sell, transfer, and deliver unto the San Antonio Brewing Association, also of the State and county aforesaid, all and singular the following personal property, being in the State of Texas, county of Travis, and in the city of

Austin, and particularly described as follows, to wit: My State, county and city R. L. D. licenses, my entire bar fixtures, consisting of 1 counter, 1 back shelf, 1 mirror showcase, 4 electric fans in complete running order, 4 winerooms, 1 storeroom, 1 safe, 1 clock, 1 partition, 4 tables, 18 chairs, 1 foot railing in front of my counter, also my entire glassware now in use in my place of business, situated in the house 104 E. 7th, cor. Congress ave., in the Austin and State of Texas. It is agreed by the San Antonio Brewing Assn. and Frank Wedig that the latter promises to pay the note secured by this mortgage at the rate of not less than fifty dollars per month from date, and all personal and license now in or hereafter contained in said premises. The title to said property, I warrant to the said San Antonio Brewing Association against any and all persons whomsoever lawfully claiming or to claim the same.

"This conveyance is intended as a mortgage, however, for the purpose of securing the San Antonio Association in the payment of a certain note for the sum of fifteen hundred dollars, payable one day after date, at interest thereon at the rate of 7 per cent per annum, together with an attorney's fee of ten per cent if not paid at maturity, as well as all indebtedness now due or to become due by the said Frank Wedig to the San Antonio Brewing Asociation. Should the said Frank Wedig pay off and discharge the said note according to its terms, reading, and tenor, as well as all his indebtedness, then this instrument shall become null and void. But should the said Frank Wedig fail to pay off and discharge the said note or the indebtedness, or any part, then in that event the said San Antonio Brewing Association, through its authorized agent, may take possession of the said property and sell the same at public or private sale, as to them may seem best, with or without notice, and the proceeds thereof to apply first to the expenses incurred in executing this trust, and next towards the payment of said note and indebted, and the remainder, if any, to pay over to Frank Wedig, his heirs, and assigns.

"In testimony whereof, witness our hands at Austin, Texas, this the 12th day of November, A. D. 1897. FRANK C. WEDIG.

"Witness: P. L. Meyer, H. F. Kaufman."

The Exhibit "B" also attached to the petition, is:

[Exhibit B.]

"The State of Texas, County of Travis:

"Know all men by these presents, that I, Frank C. Wedig, of the State of Texas and county of Travis, for and in consideration of one dollar to me in hand paid, and the further consideration hereinafter set forth, have sold, transferred, and delivered, and by these presents do sell, transfer, and deliver unto the San Antonio Brewing Assn., also of the State and county aforesaid, all and singular the following personal property, being in the State of Texas, county of Travis, and in the city of Austin, and particularly described as follows, to wit: My retail

liquor dealers licenses, consisting of State, county and city, now in use in my place of business situated at 1st floor, 104 East 7th, cor. Congress ave., Austin, Texas, and all personal property and license now in or hereafter contained in said premises. The title to which said property I warrant to the said San Antonio Brewing Association against any and all persons whomsoever lawfully claiming or to claim the same. The conveyance is intended as a mortgage, however, for the purpose of securing the San Antonio Brewing Association in the payment of a certain note for the sum of six hundred dollars, payable one day after date, date July, 1898, with interest thereon at the rate of —— per annum, together with an attorney's fee of ten per cent if not paid at maturity, as well as all other indebtedness now due or hereafter to become due by the said Frank C. Wedig to the said San Antonio Brewing Association.

"Should the said Frank C. Wedig pay off and discharge the said note according to its terms, reading and tenor, as well as all other indebtedness, then this instrument shall become null and void, but should the said Frank C. Wedig fail to pay off and discharge the said note or the indebtedness, or any part, then in that event, the said San Antonio Brewing Association, through its duly authorized agents may take possession of said property and sell the same at public or private sale, as to them may seem best, with or without notice, and the proceeds thereof to apply first to the expenses incurred in executing this trust, and next towards the payment of said note and indebtedness and the remainder, if any, to pay over to his heirs and assigns.

"In testimony whereof, witness our hands at Austin, Texas, this 16th day of July, A. D. 1898. FRANK C. WEDIG.

"Witness: P. L. Meyer."

The court below sustained a general demurrer to the petition, and plaintiff declining to amend, the court dismissed the suit, from which order this appeal is taken.

Opinion.—It will be seen, by the terms of the mortgages, that the brewing company, defendant, had the right to take possession of the property and sell it to pay the debt secured thereby, or any part of the debt. The petition shows that the debt had not been paid in full, and the right to take the property into possession can not be questioned. The exercise of that right, and securing it by process of the court could not be ground for damages. Harling v. Creech, 88 Texas, 300. Defendant is only charged with doing an act which the contract declared he could do, and it is difficult to see how it would render itself liable for doing it.

No conversion of the property is alleged, and of course, if it should be converted by defendant, it would be liable for its value, less the amount due by plaintiff. But such is not the nature of the action. It will be observed that the amount due by plaintiff is not stated; and,

even if the suit had been for conversion, the petition would be subject to demurrer.

We find no error in the judgment of the lower court, and it is affirmed.

Affirmed.

MRS. AMANDA M. ELLIS, EXECUTRIX, v. MRS. LUCY M. MABRY.

Decided January 30, 1901.

1.—Trial—Absence of Counsel.

It was not error to try a case upon its appearance day and in the absence of counsel for defendant, it being reached in its order on the call of the appearance docket for trial and the continuance or postponement of the cases preceding it.

2.—Same—Amendment—New Cause of Action.

An action for money collected by defendant upon an insurance policy in which plaintiff had an interest was not founded on the policy, and an amendment correcting its description did not set up a new cause of action nor require a new citation to authorize judgment against a defendant who had answered the original petition, upon trial had in his absence.

3.—Independent Executor—Execution—Pleading.

An averment that defendant had qualified and was acting under a will making her an independent executrix, in the absence of exception, authorized proof that she was acting as executrix, under article 1995, Revised Statutes, without control of the probate court, and was sufficient to support a judgment awarding execution against her as such, instead of certifying the judgment to the probate court for classification and payment.

4.—Damages for Delay.

See case held not to authorize the assessment against appellant of damages for delay.

Appeal from Travis. Tried below before Hon. R. E. Brooks.

E. A. Williams, for appellant. The following propositions were urged in addition to those discussed in the opinion:

The petition does not allege that Mrs. Ellis as executrix converted any portion of the money claimed by appellee, nor that any portion of said money was converted to the use of said estate of L. A. Ellis, deceased.

The amended petition charged that Mrs. Ellis converted the proceeds of the draft to her own use and does not allege that conversion was to the use of the estate of L. A. Ellis, deceased, by reason of which no cause of action arises against the said estate.

Hogg & Robertson, for appellee.

KEY, ASSOCIATE JUSTICE.—Appellee, Mrs. Lucy M. Mabry sued appellant, Mrs. Amanda M. Ellis, individually and as executrix of the estate of L. A. Ellis, deceased. A judgment was rendered for the plaintiff for $959.55, and the defendant has appealed.

There is no statement of facts in the record. The defendant filed a general denial on May 2, 1900, and the case was tried in her absence and the absence of her counsel on May 8, 1900, the same being appearance day of that term of the court. The record shows that after the call of the appearance docket for defaults the docket was again called regularly for trials, and when this case was reached, it was postponed until 2 o'clock p. m. of the same day, to await the arrival of appellant's counsel. Appellant's counsel did not appear, and at 2 o'clock the case was taken up and tried in his absence.

It was also shown that there were a number of cases preceding this case on the docket of the District Court, which had not been tried at the time this case was taken up and tried. The bill of exception states that all these cases had been called and continued or postponed, but that the orders to that effect had not been entered on the docket in a number of said cases at the time this case was tried and at the time appellant's motion for a new trial was heard. It is distinctly stated, however, in the bill that the cases preceding this had been called, and either continued, set, or passed by the court to be again called, and that this case was regularly reached and called for trial in its order and proper place, when it was tried and disposed of. The motion for new trial was filed May 10, 1900.

Under the facts above recited, there is no merit in the contention that the case was prematurely tried. It was regularly reached on the call of the trial docket, and though it was appearance day and appellant had filed an answer, appellee had the right to demand a trial, and the court committed no error in trying and disposing of the case at the time stated.

The suit was brought to recover a sum of money collected by appellant upon a life insurance policy payable to appellee upon the death of her husband, W. H. Mabry. The petition alleged that W. H. Mabry, being indebted to L. A. Ellis, deposited with him the insurance policy to secure such indebtedness, and the appellant having collected the amount due on the policy, had retained more than enough to pay the indebtedness of W. H. Mabry, and had appropriated such excess.

The plaintiff's original petition described the insurance policy as having been issued by the Equitable Assurance Society of New York. On May 7, 1900, after appellant had filed her answer, appellee filed an amended original petition, in which the policy is described as issued by the Equitable Life Assurance Society of the United States. Appellant was not cited to answer the amended petition; and it is contended that no judgment should have been rendered thereon, because it sets up a new cause of action. We can not sustain this contention. The gist of the plaintiff's action was money alleged to have been collected and wrongfully appropriated by the defendant. The suit was not founded upon the insurance policy, and the correction by the amended petition of the description of the policy did not set up a new cause of action.

It is further contended that error was committed by the trial court

in directing execution to issue against appellant as executrix of the estate of L. A. Ellis; the contention being that the judgment should have been certified to the probate court for payment in due order of administration of the estate. Appellee's petition discloses the fact that L. A. Ellis left a will, and avers that by the terms thereof appellant was made the independent executrix of said will; that the latter had been duly probated, and appellant had qualified as executrix of the estate and was still acting as such.

It is provided by statute that when a will has been probated, its provisions and directions shall be executed, unless the same are annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate. Art. 1991. And it is further provided that "any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will and the return of an inventory, appraisement, and list of claims of his estate." Art. 1995.

Though not so designated by statute, an executor acting under such a will as is referred to in article 1995 is in legal phraseology termed an "independent executor." Dwyer v. Kalteyer, 68 Texas, 554; Roberts v. Connellee, 71 Texas, 14. At any rate, whatever designation may be given to such executor, it is well settled that when he has been so appointed, and the requirements of article 1995 complied with, the probate court has no further jurisdiction over the estate, so long as he continues to discharge the trust. Holmes v. Johns, 56 Texas, 41; Bennett v. Kiber, 76 Texas, 385. It is true, the petition in this case does not allege that appellant qualified as independent executrix, but it does allege that she qualified as executrix of the estate, and that by the terms of the will she was appointed independent executrix. The petition may have been subject to a special exception because it did not show whether appellant had qualified as a regular or independent executrix of the estate; but the general averment not excepted to, that she was the qualified and acting executrix of the estate, authorized proof of the fact that the estate was being adminisered under article 1995, and independent of the probate court; and upon proof of such fact it was proper to award execution against appellant as executrix of the estate, and it would not have been proper to certify the judgment to the probate court. In the absence of a statement of facts it must be presumed that the proof showed that appellant had qualified and was acting as the independent executrix of the estate.

Some other points are made in appellant's brief, which have been duly considered, but it is not believed that reversible error is shown. It is not believed, however, that this is such a case as to authorize compliance with appellee's request for 10 per cent damages for delay.

No reversible error having been pointed out, the judgment will be affirmed.

Affirmed.

FOURTH DISTRICT, 1900.

San Antonio & Gulf Shore Railway Company v. San Antonio & Gulf Railroad Company et al.

Decided December 5, 1900.

1.—Corporation—Directors as Trustees—Purchase by Directors at Receiver's Foreclosure Sale.

The directors of a corporation occupy towards it the position of trustees, and their acts in connection with the property, such as a purchase of it for themselves at a foreclosure sale, are controlled by the principles governing other trustees, as to the obligation of the trusteeship, and in determining what action on their part will constitute a fraud, and what remedies may be applied; and such a purchase by them is held voidable at the instance of the corporation.

2.—Same—Setting Sale Aside—Tender of Amount Required.

A railway corporation made a contract for the building of its road with a construction company which was composed in part of, and controlled by, men who were directors of the corporation. Thirty miles of the road were built, and the construction company received bonds of the railway corporation in payment therefor, and the road having then been placed in the hands of a receiver, certain directors of the corporation who were also members of the construction company bought in the entire property and franchises of the road for themselves, the payment therefor being made principally in claims for debts (bought up by such purchasing directors) which had been incurred by the construction company in building the road, and which were a lien against the property. Under the decree of foreclosure ordering the receiver to sell, the purchasers took the property freed of all claims, and as the bonds issued to the construction company were not filed in the receivership proceedings, the effect of the decree of foreclosure was practically to cancel the bonds. Held, in an action by the railway company to recover the property and to have the sale decreed to inure to its benefit, that plaintiff could not recover without offering either to pay back to the purchasers the amount so paid out for the property, or to rehabilitate the bonds by taking the property subject to the incumbrance created by them.

Appeal from Bexar. Tried below before Hon. R. B. Green.

J. D. Guinn, Peter Shields, Jno. H. Clarke, and *J. W. Parker,* for appellant.

Denman, Franklin, Cobbs & McGown and *John R. Shook,* for appellees.

FLY, Associate Justice.—This is a suit instituted by appellant in the District Court against the San Antonio & Gulf Railroad Company, George W. Brackenridge, George Dullnig, J. W. Graves, and E. S. Carpenter, independent executors of the estate of John Ireland, deceased, H. O. Engelke, J. C. Davis, John Scott, and the San Antonio National Bank. A general demurrer to the petition was sustained. The object of

the suit, as appears from the prayer is to obtain judgment for the title and possession of the railway and other property belonging to appellant, for damages, for injunction restraining Brackenridge or the San Antonio National Bank from collecting a judgment purchased by him or it from the Illinois Steel Company out of property belonging to appellant until the property of Dullnig and the Ireland estate has been exhausted, and for costs, etc.

It was alleged in the petition that the appellant company was organized in 1894; that William Davis and others were elected its first board of directors, and John Ireland its general attorney, and that he served as such attorney until his death, on March 15, 1894; that a contract was made with Massey & Co. to build the railway, but, failing in the same, a contract was made by appellant with Ireland, Dullnig, Engelke, J. C. Davis, and Scott, "commonly known as the 'Construction Company,'" whereby they agreed to construct the railroad and equip the same in consideration of $12,000 per mile in bonds, secured by mortgage upon its property; that by the contract the construction company was to discharge all debts for material or labor used in the construction and equipment of the railroad; that the construction company built about thirty miles of railroad, and in so doing incurred an indebtedness for labor, material, engines, and cars aggregating about $200,000; and that appelant, relying upon the debts being paid by the construction company, on January 8, 1895, issued to it $360,000 first mortgage bonds, and they were received by the company as payment for the number of miles of railway built. It was further alleged that Ireland, Dullnig, and Engelke had William Davis removed, and Clifford elected a director and made president, and that he filed a suit against William Davis and others to obtain possession of the property belonging to the railway company, and that an injunction was obtained against Davis and others to prevent them from meeting and voting certain stock, which judgment was reversed by the Supreme Court, and the cause remanded for another trial; that afterwards Davis and his associate stockholders instituted suit against appellant, Dullnig, Ireland, and others "for certain relief, and praying the appointment of a receiver of plaintiff's (appellant's) property," and Engelke and Dullnig joined in the request for a receiver. The prayer for a receiver was granted, and Henry Terrell was appointed, and qualified as such, and took possession of the property, rights, and franchises of appellant, and held the same until the sale of the property was made.

Appellant, after alleging all the foregoing facts as constituting a conspiracy, alleges that upon the appointment of a receiver the conspiracy came to an end, and another was formed, and Ireland and Dullnig then entered into a conspiracy to secure the property of appellant through a receiver's sale; that Clifford resigned the presidency of the board of directors, and was elected in his stead. It was further alleged: That Ireland and Dullnig procured the filing of claim before the master in chancery by Colley and Potts, and that upon a hearing appellant was

adjudged to be primarily liable for the same, amounting in the aggregate to about $800, for which a lien on appellant's property was foreclosed. That Ireland and Dullnig had really bought and owned said claims. That the court ordered a sale of the property of appellant to pay the debts at an upset price of $150,000, one-fourth in cash to be paid into court. That the sale was made on July 7, 1896, in pursuance of the said decree of April 11, 1896, and Oscar Bergstrom became the purchaser as trustee, and placed in the hands of the receiver a certified check for $37,500, the bid being $150,000, and the sale was reported for confirmation. "(9) That, the said Ireland having died before the accomplishment of said conspiracy to acquire title to plaintiff's property, rights, and franchises through judicial sale thereof, his executors entered into said combination, and that they and said Dullnig were the persons for whom said Bergstrom purchased the property, and were his cestuis que trustent. That Bergstrom did not disclose, but concealed, the identity of his said principals. That thereafter, on the —— day of ——, 1896, said Bergstrom filed a written application to the court asking for the confirmation of the sale, and on November 28, 1896, the court, on consideration thereof, decreed that the report of sale be in all things approved and confirmed, and that said Oscar Bergstrom, as trustee for George Dullnig and the executors of the estate of John Ireland, deceased, bid at the sale $150,000, and that he, as such trustee, had fully complied with the terms and provisions of the decree, and had paid in the sum of $37,500 in cash; and that, as a large number of claims were pending upon intervention, which had not been passed upon by the court, and were not in condition to be paid at that time, further decreed that the balance of said money, viz., $112,500, should not be required to be paid in cash, but that the same should be paid into court within twelve months of the 15th of December, 1896, and that the possession of the property should be turned over to the said Bergstrom, as such trustee, on the 16th day of December, 1896, and that the special master and commissioner should convey by deed all of said property to said Bergstrom, trustee."

A description of the property is then given, among which the following is described: "Also the charter, rights, liberties, privileges, immunities, and franchises of this plaintiff of every kind and description whatsoever pertaining to said railway." That it was further decreed therein that the said Bergstrom, trustee, "should have and hold the said property, with all the appurtenances, rights, and privileges to each and every part thereof so sold and hereinbefore described, his successors and assigns, forever, free from any claim or demand whatsoever on the part of this plaintiff or its creditors," except for the balance of said $112,500, and that said property was to remain in the possession of said Bergstrom, subject to be retaken possession of by the court in the event they failed to pay the said balance of $112,500. And it was further ordered that to that end the said property was charged with a lien for the ultimate payment of said balance, with the power and right of the court

to repossess itself of said property to enforce the terms and provisions of the decree. In order to further secure the payment of said sum of $112,500, the said Bergstrom was required to enter into a bond conditioned that no claim or debt should be incurred which in law or equity could be held superior to the lien for the balance of said purchase money, and requiring said purchaser from time to time, and within ten days after he should be ordered by the courts so to do, to pay into court such pro rata part of the remaining balance of said purchase money as the court might decree upon claims which had been duly allowed and passed upon; and further decreed that the said Bergstrom should have the right to turn in any receipt, claim, or other evidence of debt or payment to the court upon the claim of any person entitled by the said decree to participate in said fund of $112,500, which claim, duly receipted or assigned, should be taken as though the same was cash for the pro rata share of said claim or interest, and, when paid in full of such pro rata share, should be a complete discharge of so much of said purchase price aforesaid. And the court further decreed that, after said property should be turned over to the said Bergstrom, the same should be free from all character of claims of all persons whomsoever incurred during the receivership and arising by reason of the operation of said road by the receiver, except so far as such claimants should have the right to participate in and be paid out of the said purchase price; and further decreed that the said receiver should not be held further responsible, and that the said Bergstrom, at his cost or expense, should provide the receiver with counsel to represent him in all suits then pending or might thereafter be brought which it was his duty to prosecute or defend, and that the said receiver for any services rendered by him in connection with such litigation should be allowed just compensation, to be paid out of any balance of the purchase money remaining, but in no case to be a charge upon the property purchased, except in so far as the said balance of the purchase money was a charge thereon. The decree also provided a time within which all interventions should be filed. It is then alleged that said Bergstrom went into actual possession of said property, and on the —— day of ——, 1897, said Henry Terrell was discharged as receiver, and the receivership of said property terminated; that when Bergstrom purchased the property for said Dullnig and Ireland's executors it was contemplated that another railway corporation should be formed to own and operate said railway, and that they did form the defendant San Antonio & Gulf Railroad; that on the 29th day of May, 1897, said Bergstrom, as trustee, and the said Dullnig and the said Ireland's executors, conveyed and delivered said property, rights, and franchises to the San Antonio & Gulf Railroad in consideration that it assumed to pay the balance of the purchase money, viz. $112,500. Then follows a description of the property so conveyed.

It is then averred, while Bergstrom deposited said certified check, that the said amount was in fact paid in claims of laborers and materialmen, which were owed by the said Ireland and Dullnig as members of the said

construction company, and by the said Ireland's executors as successors to his estate, "which they pretended to buy up at great discount," and that the balance of said purchase money was paid by them and the said San Antonio & Gulf Railroad in other of such claims which they likewise pretended to buy up at great discount; that it is impossible to give the names of the laborers whose claims were so used, owing to the great number thereof, and to the fact that the same are unknown to plaintiff, but that the value thereof amounted to about $60,000; that the following are some, if not all, of the materialmen's claims used in paying said purchase money, viz., $16,068, Pittsburg Locomotive Works; $34,195.92, Vaughn Lumber Company; $83,761.96, Illinois Steel Company. It is then averred that plaintiff did not owe the said labor and materialmen's claims, but that by the operation of law its railway was charged with a statutory lien for the payment thereof, and that on that account its property sustained to the construction company the relation of a surety for the payment of said claims. And it is further averred that it did not owe any debts, and was not liable for any damages to any person, company, or corporation, "but that, if it should be that it did owe any debts or was liable for any damages at the time of the application for the sale of its property and of the ordering of the sale thereof as aforesaid, then the same was a trifling amount, to wit, not exceeding $1000, and that it had abundant means and credit to pay the same."

Plaintiff further alleges that the said bonds delivered in payment for the building and equipping of its railway were not presented as a claim in said receivership, nor was any coupon for interest thereon presented, but it alleges the fact to be that the said Dullnig and Ireland's executors disputed the validity of said bonds, and denied that they or the construction company had accepted the same; and it avers that the sale of its property by the receiver was not ordered or made for the purpose of paying said bonds, or any of them, or any accrued interest thereon. "(10) It is averred: That said receiver's sale is void for the reason that each and every claim presented against the plaintiff in the said receivership was originally filed with the master in chancery appointed by the court in said receivership, and not with the clerk of the court; and that on the filing of each claim the master would issue a notice to the parties in interest requiring them to appear before him at a given time for the purpose of contesting the claim, if they saw proper to do so, except that he never gave this plaintiff such notice, nor any notice, in any case, and this plaintiff did not, in person or by attorney or agent, appear before the said master upon the hearing of any claim by him. That upon the hearing of each claim the master would make his findings, and report them to the court in which the receivership was pending, and the court would render judgment for or against this plaintiff, without notice to it, and without its appearing in person or by attorney; and that this plaintiff was not served with any citation to appear and answer any claim or demand presented against it in the said receivership, and each and every judgment rendered therein against it, including

the said Le Grand and Potts judgments, was and is for that reason null and void, and were without due process of law. That a great many claims were filed by the master, but that they are too numerous to be mentioned, but that the foregoing allegations are true with respect to each of them." The allegations in the petition with reference to the property purchased being held in trust by the purchaser are as follows: That if it shall be held that the court had power to order and confirm the sale of its property at the time it did, the effect of the sale and confirmation was to vest in Bergstrom the legal title to the property, franchises, and rights, in trust for the plaintiff, because said Ireland and Dullnig, and the Ireland executors, as successors to his estate, were under contract with plaintiff to protect its property, rights, and franchises against sale for the payment of debts for which the same was sold at receiver's sale as aforesaid; for that Ireland, who at the time claimed to be president and director of plaintiff, conspired with Dullnig, Colley, Le Grand, and Potts to get the title to plaintiff's property, etc., through a receiver's sale as aforesaid, and upon his death was succeeded in the conspiracy by his independent executors, together with Dullnig, Colley, Le Grand, and Potts, and that they carried out the conspiracy and acquired plaintiff's property, etc., at the receiver's sale as aforesaid; that the debts for which the property, etc., was sold were the debts of Dullnig and the Ireland executors, and not the debts of plaintiff.

And it is averred as follows: "And if this plaintiff did owe any debts, or was liable for any damages,—which it does not admit, but denies,—then it had abundant means and credit with which to pay the same, and it was the duty of the said Ireland and Colley, who, acting as the directors of this plaintiff, to have paid the same, and, had they been faithful to their trust, they would have paid the same; and plaintiff now proposes to reimburse the defendants or any of them any sum or sums of money that they or either or any of them may have paid in satisfaction of any valid indebtedness of this plaintiff which it primarily owed, and consents that its right of recovery herein may be conditioned upon such reimbursement; and plaintiff alleges that the defendant San Antonio & Gulf Railroad Company, when it took the conveyance from said Brackenridge, Dullnig, and Ireland's executors, as aforesaid, knew the facts which affected the property with a trust in the hands of said Brackenridge in favor of plaintiff, or by the use of ordinary care could have known them." Subdivision number 14 in the petition contains averments with reference to the transfer of property by Ireland and Dullnig to defeat the Illinois Steel Company's claim, and with reference to the purchase of said judgment by the San Antonio National Bank,—matters not necessary to be considered for the present. Subdivision number 15 claims damages growing out of the handling of the road by Brackenridge or the San Antonio & Gulf Railroad, and need not be now considered. The concluding part of the petition contains allegations seeking to recover damages of the defendants Dullnig, Graves, and Carpenter for converting the property, and this need not now be considered. In

this latter portion of the petition the following is averred: "By way of pleading in the alternative, plaintiff alleges that the said construction company, composed as aforesaid, in its contract with plaintiff to build and equip its railway, obligated themselves to pay all claims for labor and material that would, by law, become a lien upon its property; that, though they contracted the debts hereinbefore enumerated in the construction and equipment of plaintiff's railway under their said contract, and which debts were, by law, a lien upon its railway, they wholly failed to pay the same, and wrongfully allowed plaintiff's said railway, and all its properties, rights, franchises, and privileges, to be sold at receiver's sale to satisfy said debts, as hereinbefore alleged; that plaintiff was without means or credit, and was powerless to prevent said property from selling, and says, if it shall be held that the sale of said property by the receiver, as aforesaid, was valid and legal, and divested plaintiff of the title thereto, then said defendant George Dullnig and said J. W. Graves and E. S. Carpenter, as executors of the estate of John Ireland, deceased, and the said H. O. Engelke, J. C. Davis, and John Scott, are liable in damages to plaintiff for the value of all said properties, which it alleges were well and reasonably worth the sum of $500,000, and that by the loss thereof plaintiff has been actually damaged in said sum."

It is not claimed by appellant that it attempts in this proceeding to attack and set aside the judgment in the case in the District Court in which the receiver was appointed, and this court will not enter into a discussion of the question of collateral attack upon the judgment. It is admitted that the court, "having taken possession of plaintiff's (appellant's) property through a receiver, had the power to order the sale thereof upon its own motion, as well as upon the application of a creditor." The ground upon which appellant bases its suit is that its directors had, at a foreclosure sale, bought its property, and that, being its directors, they were trustees for it, and that the sale inured to its benefit. We understand, therefore, that this suit is not an attack upon the valid judgment of a court of competent jurisdiction in a collateral proceeding, nor can it be set down as in the nature of a bill of review brought to correct the judgment, because it is lacking in the characteristics of that class of proceeding, but it is simply a suit to have it declared that the directors were trustees for their corporation, and were representing it in the purchase of the property at receiver's sale, and that the benefits arising from the sale must be obtained by the corporation. On that line the matter will be considered in this opinion.

Directors of corporations occupy towards them the position of trustees, and their acts in connection with the property of the corporation are controlled by the principles governing other trustees, and the obligations of the trusteeship are made the basis for the ascertainment of what acts on the part of directors will constitute a fraud, and the remedies that may be applied. Cook on Corp., sec. 648; Perry on Trusts, sec. 207. Being in the position of trustees, the directors of the corporation could not purchase its property for themselves, and such purchase would be void-

able at the instance of the corporation. "The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the directors paid fully as much as, or more than, the property is worth." Cook on Corp., sec. 653. While the corporation can enter a court of equity, and prosecute its claim to the benefits of a purchase of its property by its directors, it must come, as must every one else who comes into a court of equity, doing equity at the same time that it seeks it. Pom. Eq. Jur., sec. 392. According to one of the allegations in appellant's petition, Ireland and Dullnig, as members of a construction company, entered into a contract with appellant to build and equip its railroad, paying all expense arising therefrom for labor or material, and agreed to accept as payment for such construction and equipment the bonds of the railway, and did so accept bonds in the sum of $360,000. When, therefore, Ireland and Dullnig bought up the claims of the laborers and materialmen to whom they were indebted, but who had a statutory lien on the property of the railroad company, they were doubtless paying their own debts. But they had their bonds. Certain stockholders came into court, and asked for the appointment of a receiver; appellant, as a matter of course, being a party. The receivership was granted, and certain debts were proved up, for which appellant was primarily liable, and the property was sold, Ireland and Dullnig being the purchasers. The bonds were not filed as claims in the receivership proceeding. The sale was reported to the court, and it was decreed that the purchaser "should have and hold the said property, with all the appurtenances, rights, and privileges to each and every part thereof so sold and hereinbefore described, his successors and assigns, forever, free from any claim or demand whatsoever on the part of appellant or its creditors." The effect of that decree was to cancel and forever destroy the bonds issued to Ireland and Dullnig. They could never afterwards affect the property, no matter in whose hands it might be, as they were held by Ireland and Dullnig at time of sale. Appellant has come into a court of equity, and asked that it be substituted for the purchasers at the sale, and that it may obtain all the benefits arising therefrom; and all the equity that it offers to perform for the great service to be rendered it by the court is the payment of less than a thousand dollars. In other words, it asks a court of equity to place it in possession of thirty miles of railway property, equipped, for which it has not paid a dollar, upon repayment to the purchaser at the receivership sale of less than a thousand dollars. If this prayer should be granted, appellant would be the owner of a railroad paid for by its directors. In the petition appellant alleges that it was not primarily liable for any but a few hundred dollars of the indebtedness for which the property was sold, and its only offer to do equity is to repay any sum of money paid by the purchasers "which it primarily owed." There is no offer to take the property incumbered with the bonds issued to Ireland and Dullnig, or to pay the amounts paid out by them for labor and material. It would seem that in equity and good conscience, if it did

not wish to pay the indebtedness for labor and material, it ought to offer to rehabilitate the bonds. We think appellant should have evinced a willingness to do one or the other, and, failing to do so, it has no place in a court of equity. In the case of Harpending v. Munson, 91 New York, 650, a stockholder had bought the suit against Munson, a director in a railroad corporation, to redeem, as such stockholder, from a foreclosure and sale of road, the same having been bought by Munson; and after discussing some other points in the case, the court said: "But the most hopeful view of the case for the appellant is that which treats the action as brought to impress a trust upon the property in the hands of Munson for the benefit of stockholders, upon the ground that as to them he was a wrongdoer. Practically this means that he should be adjudged to hold the legal title which he had acquired for the benefit of the original company and its stockholders, because of his fraudulent conduct in procuring the default which culminated in the foreclosure. Practically this would be equivalent to setting aside the sale. But a further trouble with this view of the case is that he who seeks equity must do equity. If Munson is to be treated as trustee, his lien upon the legal title for the debt can not be disregarded. The bonds he held were honestly issued, and represent an honest debt, which the company or the stockholders are bound to pay before they take from him the property he has bought. If he is not the absolute owner, he at least is such to the extent of his debt, and can defend his possession in equity until it is paid. Granting that we may wipe out all that has been done, we can not wipe out his debt or his lien. The stockholders, therefore, can only impress a trust upon his legal title, and so reclaim the property for their benefit by first paying and discharging Munson's debt; and such an offer is essential to their right of action. The suit becomes a bill to redeem. Story, Eq. Pl., sec. 187a. But none such is pleaded or proved. The one pleaded is only of $171, and there is no offer of anything else."

Under the view of the case herein presented, it becomes unnecessary to consider the numerous matters raised by different assignments of error or points raised by special demurrers. The judgment will be affirmed.

Affirmed.

Writ of error refused.

A. GARWOOD v. WILLIAM SCHLICHENMAIER, ADMINISTRATOR.

Decided January 2, 1901.

1.—Evidence—Transaction with Decedent.

Where a physician sues an administrator for medical services rendered to the latter's intestate, the plaintiff is not competent to testify that he treated the deceased and rendered the services sued for, as these are "transactions" with the deceased coming within the inhibition of article 2302 of the Revised Statutes.

2.—Physician's Bill as a Verified Account.

A physician's bill for professional services is not such an account as can be proved by affidavit under Revised Statutes, article 2323, providing that a verified open account shall be prima facie evidence of the debt.

Appeal from the County Court of Bexar. Tried below before Hon. Peter Jonas.

W. A. Wurzbach, for appellant.

C. A. Goeth, for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by A. Garwood against William Schlichenmaier, administrator of the estate of Francis Horn, deceased, in the Justice Court to recover the sum of $150, the alleged value of professional services averred to have been rendered Horn during his last illness by Garwood as physician.

In the Justice Court judgment was rendered in favor of plaintiff for the amount sued for. From this judgment the administrator appealed to the County Court, where judgment was rendered in favor of Garwood for $30. From this judgment he has appealed to this court, and in the appeal the administrator has filed cross-assignments of error.

The appellant assigns as error the failure of the Court to render judgment in his favor for the entire amount sued for, upon the ground that the undisputed evidence shows that the value of the medical services rendered by him to defendant's intestate was $150.

If there were no question as to the admissibility of the evidence upon which the judgment was rendered, we would be inclined to the view that this assignment should be sustained. But the defendant assigns as error the admission over his objection of the following testimony of Dr. Garwood: "I knew Fritz Horn. I first saw him in my office on February 22, 1899. He was then in very poor health. He was an epileptic. I treated him for said disease from February 22 to April 25, 1899. I treated him nearly every day during said period of time, sometimes every two or three days. I wrote prescriptions for him frequently and gave him medicine in my office. He would have an epileptic fit about once in three weeks. I last saw him on April 25, 1899. He was then dead. I presented my claim for my services to the administrator for $150. The affidavit that I made on the 24th day of October, 1899, that

all legal offsets, payments, and credits have been allowed, was true. The administrator rejected my claim. He paid me nothing on the same. The reasonable value of my services in attending to Fritz Horn from February 22 to April 25, 1899, was $150."

The objection urged to this testimony was that Dr. Garwood, as a party to the suit against the administrator of the estate of Horn, should not be permitted to testify to any transaction with the deceased, the witness not having been called to testify by the opposite party. The testimony admitted over this objection is as stated in the assignment.

We think the following portion of the testimony quoted was, under article 2302, Revised Statutes, inadmissible: "I treated him for said disease from February 22 to April 25, 1899. I treated him nearly every day during said period, sometimes every two or three days. I wrote prescriptions for him frequently, and gave him medicine in my office." We can not agree with appellee in his contention that this testimony is not "as to any transaction with the intestate within the meaning of the statute referred to." Webster defines "transaction" as follows: "(1) The doing or performing of any business; management of any affair; performance. (2) That which is done; an affair; as the transaction of the exchange." It is defined in Anderson's Dictionary of Law to be "Whatever may be done by one person which affects another's rights, and out of which a cause of action may arise." The doing or performing of the business shown by the testimony quoted was by Garwood *with* the deceased, and was clearly such transaction as the witness was inhibited from testifying to under the statute, under which it has been held a physician was incompetent to prove his own services as such to the deceased, against the representative. Abbott's Trial Ev., 2 ed., 23. If, however, the performance of the services had been proved aliunde, when so proved it seems plantiff could have testified as to the value. Morrisette v. Wood, 26 So. Rep., 307.

An account by a physician for his services is not such as can be proved under the provisions of article 2323, Revised Statutes. The word "account" as used in that article applies to transactions between persons in which, by sale upon the one side and purchase upon the other, the title to personal property is passed from one to the other, and the relation of debtor and creditor is thereby created by general course of dealing. McCamant v. Batsell, 59 Texas, 363; Railway v. Daniels, 62 Texas, 70. The only purpose for which the account sued on was admissible in evidence was to show that it had been properly verified as a claim against Horn's estate, and that it had been rejected by the administrator, and it was error to admit it in evidence for any other purpose.

For reason of the errors pointed out by the cross assignments of error as above indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

R. A. ALLEN ET AL. v. R. A. HALL.

Decided January 2, 1901.

1.—Jurisdiction of Court of Civil Appeals—Appeal from County Court—Amount.

The Court of Civil Appeals has no jurisdiction in a case originating in the justice court where the amount in controversy and the amount for which the judgment was rendered is less than one hundred dollars, although the county court may have erroneously dismissed the appeal thereto from the justice court. Following Railway v. Rowley, 22 Southwestern Reporter, 182.

2.—Same—Cases Reviewed.

Williams v. Sims, 4 Willson Con. Cases, section 151, and Loper v. State, 17 Southwestern Reporter, 1090, not followed, and Pevito v. Rodgers, 52 Texas, 581, held not to be in conflict with the ruling in this case.

Appeal from the County Court of El Paso. Tried below before James R. Harper.

Maurice McKelligon and *Patterson & Buckler,* for appellants.

FLY, ASSOCIATE JUSTICE.—This suit was instituted in the Justice Court against C. A. Green, R. A. Allen, and B. F. Darbyshire, by appellee to recover the sum of $25.70 on an open account. The trial in that court resulted in a judgment in favor of appellee for the amount sued for. From that judgment R. A. Allen and B. F. Darbyshire appealed, and the appeal was dismissed from the County Court because the bond was not made payable to C. A. Green, a codefendant, as well as to the plaintiff.

This court has no jurisdiction in this case, because the amount in controversy and the amount for which the judgment was rendered is less than one hundred dollars. In article 996, Revised Statutes, it is provided that the courts of civil appeals shall have appellate jurisdiction of civil cases of which the county court has appellate jurisdiction when the judgment or amount in controversy or the judgment rendered shall exceed one hundred dollars, exclusive of interest and costs. The statute is too clear to admit of a doubt as to its meaning, and under its provisions in no case in which the amount involved is less than one hundred dollars can an appeal be prosecuted to the Court of Civil Appeals from a county court, whether the case was tried de novo or not. Railway v. Rowley (Texas Civ. App.), 22 S. W. Rep., 182.

We are cited to the cases of Williams v. Sims, 4 Willson Civil Cases, sec. 151; Loper v. State, 17 Southwestern Reporter, 1090, and Pevito v. Rodgers, 52 Texas, 581, as sustaining the proposition that "where the county court has erroneously dismissed an appeal from the justice court, an appeal will lie to the Court of Civil Appeals, without any regard to the amount in controversy." That proposition is sustained by the first two opinions above cited, which were rendered by the Court of Appeals, and in which the case of Pevito v. Rodgers is cited as sustaining the position therein taken. That case, however, does not sustain them.

The error seems to have arisen from an erroneous syllabus of the case. As said by the Court of Civil Appeals in Railway v. Rowley, above cited: "A perusal, however, of the opinion itself in Pevito v. Rodgers shows unquestionably that the amount involved, and the amount of the judgment rendered in the Justice Court, from which the appeal was prosecuted to the County Court, and was thence dismissed, exceeded $100. The case was thus brought clearly within the provision already set out, fixing the jurisdiction of the Court of Appeals, and could not properly be cited to sustain the view heretofore adjudged by that court."

Because this court has no jurisdiction of the appeal, it is dismissed.

Dismissed.

Application for writ of error dismissed by the Supreme Court.

Galveston, Harrisburg & San Antonio Railway Company v. Sam G. Eckles.

Decided December 12, 1901.

1.—Evidence—General Reputation.

Where a witness was asked if he knew the reputation borne by R. at a stated time for competency or incompetency as a locomotive fireman among railroad men in S. and other places, and he answered that he did only from having heard it discussed on a number of occasions, an objection to the evidence as not going to general reputation was untenable.

2.—Same—Objection Waived.

A party loses his right to complain of evidence as being merely the opinion of the witness where he suffers testimony of the same character from other witnesses to go to the jury unchallenged.

3.—Same—Medical Bills—Allegation Limiting Recovery.

Where plaintiff's petition alleges that because of his injuries he paid for medicines a stated sum, he may testify that he paid a larger given sum for medical bills, but the jury should be required to find only for some amount within the sum alleged in the petition.

4.—Same—Deposition—Harmless Error.

It was harmless error to admit the deposition of a witness given on a former trial where it was not read or submitted to the jury, and did not differ materially from his testimony given on the stand.

5.—Amendment—New Cause of Action—Limitations.

Where plaintiff, a railroad switchman, alleged that his injuries were occasioned through the negligence of R., an incompetent employe, and that he had complained of R. to one O., a vice-principal of defendant company, his second amended petition alleging that the complaint was made to O. and also to M., yard foreman and vice-principal, this did not set up a new cause of action within the rule as to limitations.

6.—Same—Practice on Appeal—Presumption from Record.

Where only the original petition, and second amended petition containing the new allegation, are before the appellate court, and there is nothing in the record to show the date and contents of the first amended petition, the presumption obtains in favor of the ruling of the trial court that the first amendment was filed in time and also contained the new allegation.

7.—Estoppel by Statements in Application for Writ of Error.

Statements by plaintiff in an application to the Supreme Court for writ of error on the ground that a judgment of reversal practically settled the case, as he could not procure further evidence, can not be made to operate as an estoppel against his afterwards pleading and proving additional and material facts in the case on another trial.

Neil, Associate Justice, dissenting.

ON REHEARING.

8.—Jury—Crediting Witness in Part Only.

It is within the province of the jury to give credence to a part only of the testimony of a witness, and to reject the other part.

9.—Railway Company—Vice-Principal.

Where a yardmaster has power to discharge any and all employes within the yards, he is, so far as concerns the proper discharge of such duties, a vice-principal of the railroad company.

Appeal from Bexar. Tried below before Hon. Robert B. Green.

Upson, Newton & Ward, for appellant.

Camp & Camp, Floyd McGown, Davis & Williams, and *William Aubrey,* for appellee.

FLY, ASSOCIATE JUSTICE.—This is a suit for damages brought by appellee, and this is the third time it has been before this court. 7 Texas Civ. App., 429; 26 S. W. Rep., 1117, and 54 S. W. Rep., 651. The last trial resulted in a verdict in favor of appellee for $30,000, of which $10,000 was voluntarily remitted, and judgment was rendered for the sum of $20,000.

There are facts to sustain a conclusion that appellee was seriously and permanently injured through the negligence of appellant. Appellee, through the negligence of Ross, who was an incompetent servant, and whose incompetency was known to appellant, was caught between two cars, and his head mashed so that blood spurted from his ears, and one of his eyes was forced from its socket and hung upon his cheek; that unconsciousness resulted for two or three weeks; that appellee was in bed for many months; that his skull was fractured and portions of it taken out, and appellee had been changed from a robust, intellectual man into a man weak in mind and body, who for ten years has endured much suffering and is permanently disabled. His hearing and seeing have been rendered defective by the injury, and portions of the brain are so exposed that a slight blow might produce death or insanity. Appellee was earning $2.75 a day when injured, but since has been incapacitated for active labor, mental or physical.

The first assignment of error complains of the following question and answer asked C. L. Harris, and answered by him: "Do you know the reputation borne by A. A. Ross for competency or incompetency on or before the 30th day of November, 1890, as a locomotive fireman among

railroad men in San Antonio and other places, and if yes, state what was his reputation on said date?" "I know the reputation borne by A. A. Ross on and before the 30th day of November, 1890, as a locomotive fireman among railroad men in San Antonio and other places, only from having heard it discussed on a number of occasions." The objections to this question and answer were that they did not relate to the general reputation of Ross, but pertained alone to reputation, and that the witness had not qualified himself to testify as to general reputation.

The reputation inquired about was that among railroad men not only in San Antonio but other places, the only class of men upon whose opinion the reputation of a locomotive fireman could properly be based, and a reputation among that class of men would be a general reputation. The witness swore to a knowledge of that reputation, and stated further that he had obtained the knowledge of the reputation by hearing them discuss it on a number of occasions. Suppose the question had been as to general reputation, that reputation must have been made among railroad men, for they were his associates, and no one else would be in a position to know what constituted a competent or incompetent fireman; and it would seem clear that when the question was as to the reputation among railroad men, and the answer given as to the reputation among railroad men, it necessarily covered all the reputation the fireman had.

The second assignment of error refers to a bill of exceptions as its basis, but an inspection of the bill of exceptions shows that the questions and answers do not refer to the reputation of Ross as stated in the assignment of error, but the questions are addressed to the knowledge that the witness had of the competency or incompetency of Ross as a fireman. The objection to that evidence is not tenable. The witness had already testified without objection to the same facts objected to, and if this had not waived any right to object, the witness had qualified himself as an expert, fully competent to give an opinion on the fitness of the fireman to perform his duties. Terrell v. Russell, 16 Texas Civ. App., 573.

The witness Doane qualified himself to testify as to the competency of the fireman, and the testimony was admissible. Testimony of the same character from other witnesses went unchallenged to the jury, although the objection that the evidence was merely the opinions of witnesses was as applicable thereto as to that of Doane, and appellant has thereby lost the right to complain. It was alleged in the petition that appellee had been compelled to pay $100 to physicians, $250 for medicines, and $150 for nurses' hire, but appellee swore that he had paid on medical bills about $750, and this was objected to because there was no allegation to support it, and because the amount was larger than named in the petition. There was an allegation that medical bills were incurred by reason of the injuries inflicted by appellant, and it can not be reasonably contended that a party is prevented by an allegation of a certain amount from swearing the truth as to expenditures. The jury in such a case could be required to find only for some amount within the maximum alleged. In the charge, amounts paid for medicines, doctors,

or nurses were not included in the damages to be found by the jury. In view of a remittitur of $10,000, it would seem that any excess of verdict for medicines or medical bills was cured.

The testimony of M. J. Mulligan at a former trial was admitted in evidence over the protest of appellant, the objection being that it was irrelevant and immaterial. It is stated in a qualification of the bill of exceptions to the admissibility of the testimony that while the evidence was admitted it was not read to court or jury, and there is nothing in the record indicating that the testimony, which was in writing, was carried by the jury when they retired to consider their verdict. It can not be inferred that the mere ruling of the judge that the testimony was admissible could have injured appellant, when the jury was not made acquainted with the facts permitted to be introduced. The testimony, however, is included in the statement of facts, and an examination shows that the testimony does not differ in any material matter from the testimony of the witness on the trial, and while it should have been excluded, no injury appears to have resulted from its admission, and its admission would not be ground for reversal. Railway v. Hume, 87 Texas, 211.

The seventh assignment of error complains of the refusal of the court to allow Dr. Graves to testify why appellant would not take appellee back into its service. The bill of exceptions upon which the assignment is based shows that Dr. Graves did testify as to why the railroad company would not take appellee into its service, and the only part of the evidence that appears by the bill of exceptions to have been excluded was what the railroad officials told the witness. From the statement of facts it appears that even that part of the testimony was not excluded, and the statement of facts was agreed to by appellant.

The eighth assignment of error can not be sustained, for the reason that both the bill of exceptions and statement of facts show that the evidence desired to be elicited by a leading question was given by the witness in answer to legitimate questions.

It was not error to refuse the special charge embodied in the ninth assignment of error. There was testimony that strongly tended to prove that Mulligan was a vice-principal of appellee, and to have instructed the jury that he was not, would have been a gross usurpation of the prerogatives of the jury.

The tenth assignment of error is to the effect that the court erred in refusing to give a certain charge requested by appellant, as follows: "Defendant asks the court to charge the jury that before plaintiff can recover in this case he must prove by a preponderance of evidence that he complained to M. J. Mulligan of the incompetency of the fireman, A. A. Ross; that said Mulligan promised to remove said fireman; that said fireman was incompetent; and that said plaintiff did not know that said fireman had not been removed from the engine when he was hurt; that said Mulligan had the power and authority to hire and discharge said fireman, and that plaintiff was injured by reason of the incompetency of said fireman." The court had already charged the jury correctly on

every point presented by the requested charge, and it was not error to refuse to give it.

It was not error to refuse the charge contained in the eleventh assignment of error. In the original petition it had been alleged that appellee complained of the fireman to one O'Toole, and in the second amended petition it was alleged that the complaint was not only made to O'Toole but to Mulligan. The addition of the allegation as to Mulligan did not set up a new cause of action. The damages are sought for the same acts of negligence as in the original petition, and that pleading had the effect of arresting the statute. Southern Pacific Co. v. Wellington, 57 S. W. Rep., 856, and authorities therein cited; Oil Co. v. Stewart, 17 Texas Civ. App., 59. None of the Texas authorities cited by appellant sustain its contention. In the case of Bigham v. Talbot, 63 Texas, 271, cited by appellant, it is said, in sustaining the plea of limitation to the cause of action: "If, however, there had been any allegations in the first amended petition in any way retaining, even as part of the cause of action therein asserted, that which was asserted by the original petition, and afterwards reasserted by the second amended petition, that would have been sufficient to prevent the running of the statute after the original petition was filed." Can it be consistently contended that no part of the original cause of action is contained in the second amended petition? It is not so contended, but it is contended that the addition of the pleadings, as to Mulligan changes the cause of action. The contention is without merit. It may be noted in this connection that only the original petition and second amended petition are before this court, and there is nothing in the record to show the date of the first amended petition, and the presumption would prevail that it was filed in time and contained the proper averments to meet the objections of appellant and sustain the ruling of the court.

The court properly refused to instruct the jury that appellee was estopped from alleging and proving that he had made complaint of the incompetency of Ross to Mulligan by reason of a motion for rehearing filed in this court on a former appeal and an application for writ of error to the Supreme Court. The case of Portis v. Hill, 14 Texas, 74, and 30 Texas, 563, is cited as sustaining the novel proposition contained in the requested charge, but there is nothing in those decisions to support the contention. The admissions in the motion for rehearing and in the application for writ of error would be evidence that might tend to prove the falsity of the testimony of appellee as to his complaint to Mulligan, but does not contain anything that would constitute an estoppel.

The thirteenth assignment of error contains statements as to arguments made by counsel and other matters that are not supported by the record, and which can not be considered by this court. The conclusions of fact dispose of the remaining assignments of error.

The verdict was a very large one, even after a remittitur of $10,000, but the evidence introduced by appellee established that he has been transformed, by the injuries inflicted on him, from a robust young man

into a pitiable wreck in mind and body; that for ten years he has suffered intensely, and we do not feel authorized to hold the verdict excessive, as reduced by the remittitur. It is not now an open question as to the propriety of the remittitur in the District Court. Railway v. Syfan, 91 Texas, 562; Railway v. Johnson, 24 Texas Civ. App., 181; 58 S. W. Rep., 622.

The judgment will be affirmed.

Affirmed.

ON MOTION FOR REHEARING.

JAMES, CHIEF JUSTICE.—The majority of the members of this court see no ground for reversing the judgment of the District Court consistent with the right of the jury to try disputed questions of fact. The dissenting opinion filed in this case would hold that the jury were not warranted in considering, in connection with plaintiff's testimony (and the testimony of others) that the train came to a full stop, the testimony of the engineer that the fireman was taking the signals from plaintiff and repeating them to him (the engineer) at the time of the accident, to come back slowly. True, the engineer, Walton, testified that the train had not stopped. We can not understand why the jury, in weighing the testimony of Walton in connection with the testimony of others, could not give credence to part of his testimony and reject the rest. We have no right to say as a matter of law that they should have accepted all his testimony or none. There was evidence to the effect that the engineer had stopped the train on a signal of plaintiff to the fireman, and that the engineer then moved the train and injured plaintiff while acting in accord with signals conveyed to him by the fireman. This would indicate that the movement which injured plaintiff resulted from the fireman's acts. He had seen plaintiff going in between the cars, yet he gave the engineer the back signal, and only notified him to stop when he saw plaintiff was hurt. He testified, as did Walton, that the train had not stopped, but three, and probably four, witnesses testified positively that it had stopped. If it had stopped as plaintiff testified, on a stop signal given by him (and in this he is corroborated by the testimony of several witnesses that it did in fact stop), and the jury so believed, they could not very well escape finding that Ross was negligent, because both he and Walton testify that such signal was not the one repeated to the latter. Where three or four persons testify that the train did come to a stop when plaintiff went in between the coaches, it can not be said that a finding of such fact is clearly against the weight of the evidence. Nor can the jury be justly charged with disregarding the evidence in finding such fact, and in giving it effect in connection with other testimony which they believe to be true.

Another ground of the dissent is that under the testimony the fact clearly appeared that plaintiff saw and must have recognized that the fireman he was giving signals to was Ross, of whose incompetency he had

(as he testified) recently complained. Plaintiff denied having been on the engine, or that he knew that Ross was fireman on the engine that morning, and he testified that he had been giving signals from the engineer's side, and that just before he went between the coaches, and when the train was nearing the coaches that were to be coupled on, he went to the fireman's side and gave first a slow-up signal and then a stop signal, and that he did not know Ross was the fireman until after he was hurt. It is true that he might have recognized Ross, who testified he was looking out at the window from the fireman's side, taking signals from plaintiff. But it is not certain that plaintiff was looking, or looking intently, in the direction of the fireman; nor, if he had, that he must have identified him; nor do we find that appellant claims that it certainly appears that plaintiff must have identified Ross on the engine. If it was true that the yardmaster had promised plaintiff to remove Ross, he might naturally have relied on it having been done.

There was testimony from which it could have been found that Ross was incompetent; that plaintiff ascertained his incompetency while working with him; that he reported this fact to Mulligan, the yardmaster, complaining of Ross being retained for that reason, and that Mulligan promised to remove Ross as fireman. If Mulligan was appelant's vice-principal, with power to remove this fireman for incompetency, there can be no doubt that it was competent for the jury to find in this case that appellant was informed of the incompetency of Ross and was negligent in having him there that morning as fireman. This leads us to a question of law whether or not a servant to whom appellant has committed the power to remove employes for incompetency is its vice-principal within the scope of such power. The test for determining whether employes were fellow servants or not at the time of this occurrence was the power to employ and discharge. The evidence here is wanting in respect to showing that Mulligan, the yardmaster, had power to employ men, but it is ample that he in fact had and exercised the power to discharge any employe whom he discovered to be incompetent in and about the yards. His acts in this regard were effective. It was not indispensable that he should also have had power to employ; otherwise it would have been possible for appellant to have given one person the power to employ and another the power to discharge, and neither be a vice-principal. It is the duty of a railway company to exercise ordinary care with a view to having only competent men in its service, and this is a duty the performance of which it owes to its servants generally. If it committed to Mulligan, either expressly or in practice, the power to discharge for incompetency employes within the yards of which he was master, then he was its vice-principal so far as the performance of said duty was concerned. We believe the evidence was suffiicent to authorize finding that he was a representative of appellant in regard to its said duty.

The evidence upon some of the essential facts may not be satisfactory to us, and we would probably have reached different conclusions from it

if it devolved on us to pass upon its weight and credibility. This is not our province, and we believe it would be going too far to say that the verdict is clearly against the weight of evidence.

In the opinion already delivered we expressed the belief that, even as reduced by remittitur in the District Court, the verdict is a very large one. It was chiefly on account of plaintiff's testimony that we then concluded to allow it to stand. After reconsidering all the evidence bearing on his injuries, and the permanency thereof, we conclude that the verdict should not exceed $15,000, and if plaintiff will within five days remit enough to reduce it to that sum, we will affirm such judgment. Otherwise the judgment will be reversed and the cause remanded.

The motion does not convince us of any errors that require a reversal of the judgment.

NEILL, ASSOCIATE JUSTICE (dissenting).—To sustain the judgment in this case it must reasonably appear from the evidence (1) that appellee's fireman, Ross, was incompetent to discharge the duties of employment in receiving and communicating signals to the engineer for the movement of his engine; (2) that appellant at the time of the accident knew, or by the exercise of reasonable diligence could have known, of the fireman's incompetency in that regard; (3) that appellee did not, when performing the service in which he was injured, know that Ross was incompetent, or, if he did know it, he did not know Ross was the man to and from whom he was communicating and receiving signals for the management or movement of the engine; (4) that Ross, by reason of his incompetency, when the engine was at a standstill, without being signaled so to do by appellee, gave a signal to the engineer to move his engine, and that its movement in obedience to such signal was the cause of appellee's injury.

I believe the evidence is sufficient to warrant the jury in finding that Ross was incompetent to discharge the duties of his employment. But in my opinion it is wholly insufficient to establish the other three issues essential to appellee's recovery. If I am mistaken in this, I can not be in the conclusion, formed from reading and carefully considering all the evidence, that the overwhelming weight of the testimony upon these issues is against the appellee.

There is no room from the evidence to question the fact that before employing Ross as a fireman, from the exercise of ordinary care to fit him for his duties and to determine his qualifications, appellant really believed that he was reasonably competent to discharge the duties of his employment. If the appellant knew, or, by the exercise of reasonable diligence could have known, of his incompetency, it must have obtained such knowledge, or be imputed with it, from a failure to exercise ordinary diligence to discover his incompetency after Ross was employed and engaged in its service. Appellant, having at the time of the employment exercised ordinary care in determining the competency of its

servant, must, in order to render it liable for the consequences of his incompetency, have been either informed of such acts or omissions on the part of Ross as would, under like circumstances, indicate to an ordinarily prudent person that he was incompetent to discharge his duties; or have failed to exercise such supervision over him in the performance of his labor as would, if exercised, be reasonably sufficient to show his incompetency. The contention of the appellee is that he, having himself learned of Ross' incompetency to correctly take and communicate signals on the evening before the accident, made complaint to the fireman's vice-principal, and informed him of the fact that Ross was incapable of performing his duties as fireman. It is through this communication alone that he seeks to charge appellant with knowledge of the incompetency of Ross. If the fact of incompetency were in the manner claimed made known to one of appellant's servants who had authority from his master to employ or discharge a fireman, knowledge thus obtained would be the knowledge of the company. If, then, with such knowledge, appellant, through such vice-principal, promised appellee to discharge Ross and have a competent fireman in his place, and appellee continued in its service as a switchman, relying on such promise, and while in the discharge of his duty, without knowing that Ross was the fireman on the engine, was injured by reason of a wrong signal given by Ross to the engineer, the company would be liable for the injury thus inflicted.

In his original petition the appellee alleged that one Fuller, nicknamed O'Toole, was the vice-principal to whom he complained of Ross' incompetency and who promised to discharge him. Having obtained a judgment on the petition containing such allegation, which, on appeal to this court, was reversed because the evidence was insufficient to show that Fuller had authority to employ or discharge a fireman, the appellee applied to the Supreme Court for a writ of error upon the ground that the decision practically settled the case, and he could obtain no other or further evidence on another trial. The application being denied, he then amended his pleadings by alleging that one M. J. Mulligan was Ross' vice-principal, having authority to employ and discharge its firemen, and that he complained to Mulligan of Ross' incompetency, and that he promised to remove him. If, then, it should be conceded that the complaint was made to Mulligan (which I do not believe the evidence is sufficient to show), to charge appellant with knowledge of Ross' incompetency it must appear from the evidence that Mulligan was intrusted with the performance of the duty of hiring and discharging appellant's fireman of switch engines. For if he was intrusted with such duty, he could, upon determining the truth of the complaint, have performed the company's duty of removing Ross and employing a competent fireman in his place.

Mulligan was, at the time of the accident, appellant's yardmaster at San Antonio. The testimony of himself and of those who from their relation to the company were in the best attitude to know, to my mind

shows beyond a reasonable doubt that Mulligan was vested with no authority by the company to either employ or discharge its firemen. He had authority, subject to the approval of the division superintendent, to employ and discharge switchmen. But at the time the complaint is alleged to have been made to Mulligan of the incompetency of Ross, Harry Nangle, then in charge of appellant's roundhouse, and J. J. Ryan, general master mechanic, were the only persons authorized to employ and discharge firemen. Taking the most favorable view to the appellee of the evidence on this point, it goes no further than to show that when he reported any of appellant's employes for negligence, inefficiency, incompetency, or disobedience to orders, *when at work in the yard* of which he was foreman, and recommended their removal, they were relieved or discharged from further work *there* by the officers of the company having authority to discharge them. This falls far short of proof that he had the authority from the company to employ or discharge a fireman.

In the face of his allegations, it can not be contended by appellee that he was ignorant of the fact that Ross was incompetent to discharge the duties of a fireman on a switch engine. If then he, after having complained of the fireman's incompetency, and, as he claims, having such promise from him to whom the complaint was made, knew on the morning of the accident that such unskillful fireman was on the engine, and that he, in the discharge of his duties as switchman, would have to give and receive signals from him, which, from his incompetency, Ross was unable to properly perform, by continuing with such knowledge in appellant's service the appellee, as incident to his employment, assumed the risk of all danger that might naturally and probably result from the incompetency of such fireman. I can not perceive, under the evidence in this case, how it is possible for the appellee not to have known, when he was performing the service in which he was injured, that the same fireman of whose incompetency he had complained was on the engine receiving from and communicating signals to him. If he knew Ross by sight, though he may not have known his name well enough to identify him in making the complaint, then he must have recognized him on the engine the next morning just prior to the accident when giving signals to and receiving them from him. Ross was necessarily in a position where he could be easily seen and recognized by the appellee, and there was nothing to prevent such recognition. Knowing that Ross was incompetent, and expecting him to be replaced by a more efficient servant, it is improbable that appellee when he resumed his duties on the morning he was hurt did not see and know who the fireman was upon whose skill and efficiency his own safety depended while discharging his duties as switchman. Ordinary care for his own safety dictated that he should exercise the opportunity of looking the fireman in the face and ascertain whether he was the one against whom he had made complaint, or some one else, before he commenced his day's labor. And for him to say that

he did not, is to say that he acted contrary to the dictates of human nature and reason.

Upon the fourth essential issue, the appellee's evidence is to the effect that while the engine was moving slowly in obdience to a slow signal given by him, he made a coupling to two cars, and then gave the man (Ross) on the fireman's side the stop signal; that the engine in obedience to the signal came to a stop; that he then went under the coaches to cut the airhose and stopcock; and while under there in the act of cutting the airhose, the engine was placed in motion, and he was caught between the platforms of the two cars and thereby injured. None of the testimony introduced by appellee tends to show that after the engine was stopped in obedience to his signal the fireman gave the engineer any other signal, or that any signal word or act of Ross caused the engineer to set the engine in motion while appellee was under the cars. If the evidence on this point had closed with appellee's testimony, I should say without hesitation that there is not a scintilla of evidence that tends in the least to prove this issue in appellee's favor. But appellant's witnesses give a different version of how the accident occurred. It appears from the following testimony of Mr. Walton, the engineer. He says: "At the time of the accident we were backing two sleeping cars on Davis 1—switch to couple on to the coaches standing on the switch. I backed at the rate of three or four miles an hour until I got about one car length of the coaches, when I slowed down to about one mile an hour to make the coupling. The fireman was taking the signals from the plaintiff and repeating them to me at the time of the acident to come back slowly. Fuller was on my side of the engine giving me a slow-back signal; we struck the car going very slowly, and immediately after I felt the jar of the cars in coupling; the fireman called me to stop, saying some man had his foot cut, and I immediately applied the airbrake, reversed the engine, and instantly brought the train to a stop. I looked from the fireman's side of the engine and saw plaintiff stagger out as though from between the coaches." It is only by excising from the testimony quoted the sentence, "the fireman was taking the signals from the plaintiff and repeating them to me at the time of the accident to come back slowly," and joining it to appellee's testimony, that a conclusion can be reached on this issue favorable to him. I do not think testimony should be juggled with in this way in order to reach a conclusion in favor of or against either party. There is no more reason for taking this excerpt of Walton's testimony as true and other portions of it as false than there would be for considering the excerpt false and the other part true. This sentence is in perfect harmony with the entire body of the testimony of appellant, coming from a number of witnesses, as to how the accident occurred; and can only be reconciled with appellee's version of it by considering all the other evidence of appellant on this point false. In my opinion the great preponderance of the evidence shows that appellee gave no stop signal; that the train had not stopped, but was moving slowly in obedience to

a slow signal given by appellee to Ross and properly communicated by him to the engineer; that Eckles negligently went under the coaches when the train was in motion, and that his own negligence was the proximate cause of his injury.

The verdict of the jury in this case was for $30,000. It is unnecessary for me to enter into any argument or cite authorities to show that it is excessive, for this is confessed by appellee's entering of a remittitur of one-third of it. When I consider the size of this verdict, confessedly $10,000 in excess of the damages sustained, I can not but conclude that it is the product of passion and prejudice. Being of this opinion, in view of my best judgment that on three essential issues (if the verdict upon them finds any support at all in the evidence) the finding of the jury is contrary to the overwhelming weight of the testimony, I am driven to the conclusion that the passion and prejudice of the jury influenced them in their finding on these issues as well as on the issue of damages. If a verdict is clearly the exponent of passion and prejudice, as I believe this one to be, it would be a denial and mockery of justice to let it stand. It is not for the appellee to say how much he will take from the appellant, but for a fairminded and impartial jury to determine from a consideration of the evidence, how much, if anything, he is entitled to under the law. When a fair and impartial jury have reached a verdict, such as they believe the law and evidence justify, then, if it should upon appeal be deemed excessive, it may be cured by a remittitur. But I do not believe that a verdict which is clearly the exponent of passion and prejudice can be cured in any other way than by setting it aside and holding it for naught.

For the reasons stated I have dissented from the opinion of the court affirming the judgment, and believe a rehearing should be granted and the cause remanded for another trial.

Writ of error refused.

PARLIN & ORENDORFF COMPANY v. R. L. MILLER ET AL.

Decided January 9, 1901.

1.—Plea in Abatement Waived.

A plea in abatement and demurrer asserting defendant's privilege to be sued in another county are waived when not presented at the first term of court, and no reason is shown for such failure.

2.—Parties—Jurisdiction—Conversion of Mortgaged Property.

In an action on a note secured by a chattel mortgage, parties who have, with notice, converted and disposed of the mortgaged property and rendered it inaccessible, may be joined as for conversion, although a foreclosure of the mortgage be impracticable.

3.—Same—Principal and Agent—Tort—Election.

Where plaintiff is entitled to sue both the principal and agent for a tort, he may sue both or either, and can not be required to elect which one he will proceed against.

4.—Failure to Produce Books—Effect—Charge.

A charge to the effect that a party's failure to produce his books of account in obedience to a subpoena duces tecum must be accepted as proof that, if produced, they would be adverse to his interest, is unwarranted and on the weight of evidence where there is testimony in the case tending to show a reasonable excuse for such failure.

5.—Witness—Discrediting Not Allowed.

Where it is not claimed that defendants were misled by their witness, or surprised at his testimony, they can not, with the view of discrediting him, read to him in the presence of the jury from his previous deposition in another proceeding, and ask him how he reconciles his testimony with the deposition.

6.—Evidence—Admissions of Agency—Harmless Error.

Error in admitting the declarations of one that he was acting as agent for defendant and of his failure to deny such agency when taxed with it, is harmless where there was other evidence sufficient to establish the agency.

7.—Assignment of Error—Issue Not Raised.

An assignment of error to the court's refusal of a charge that was erroneous does not raise the question of error in its failure to submit that issue in some form.

8.—Agency—Proof of.

As tending to proof that C. was defendant's agent in the matters in controversy, it was permissible for plaintiff to show that the affidavit to defendant's pleas in the case were signed and sworn to by C. as his agent.

9.—Evidence—Practice—Depositions.

Where defendant read in evidence against plaintiff an application by the latter for a continuance in order to retake certain depositions, it was not error to allow plaintiff to read in evidence certain explanatory exhibits attached to the application.

10.—Verdict Construed.

A verdict against a joint defendant, who was liable as for conversion of the mortgaged property, for the sum of $2500, the amount of the note secured by the mortgage, together with interest and attorney's fees, "provided the amount does not exceed $3000" (the value of the mortgaged property), does not deny any recovery at all where such total amount exceeds $3000, but merely limits the recovery to that sum.

Appeal from Gonzales. Tried below before Hon. M. Kennon.

U. F. Short and *Atkinson & Abernethy,* for appellant.

Harwood & Walsh and *Burgess & Hopkins,* for appellees.

JAMES, CHIEF JUSTICE.—This action was brought by R. L. Miller against O. B. Robertson upon a note, asserting a chattel mortgage lien on certain cattle. R. W. London and Parlin & Orendorff Company were joined as defendants on allegations substantially as follows: "That after due registration of plaintiff's mortgage in Gonzales County, the residence of Robertson, and where the cattle were, appellant, having obtained a judgment against him in Dallas County, caused an execution to be levied on the cattle and had them sold in Gonzales County, at which sale they were bid in by R. W. London for $100, the real value of the cattle being not less than $3500. That actual notice of plaintiff's lien was given at and before the sale, and they were by the sheriff sold subject to the mortgage. That they were delivered by the sheriff to London, who

removed them from the county and sold, disposed of, and converted them to his own use, and placed them beyond the jurisdiction of the court. That he unlawfully converted the cattle to his own use and benefit, with notice of plaintiff's lien.

"That in all the acts and doing of the said London hereinbefore set out, he was the agent in fact for the said Parlin & Orendorff Company, and that the said company are the real purchasers of the said cattle, and in all ways liable for the said acts of the said London as fully set forth herein; and that by reason thereof, they in law became liable, upon the maturity of the said note, to pay this plaintiff the amount of his said note, interest, and all costs; and they, having failed and refused to tender the same since the maturity of said note to this plaintiff, are also liable to him for the 10 per cent collection fees upon the principal and interest of the said note, it having been placed in the hands of attorneys for collection as hereinbefore set out, which amount is a reasonable charge, and that charged by said attorneys for said collection—all of which the said Parlin & Orendorff Company have failed and refused to do, or any part thereof, to this plaintiff's damage in the sum of $3000.

"Premises considered, plaintiff prays that all of said parties be cited to answer this petition; and upon hearing hereof he have judgment against said O. B. Robertson for said note, interest and said 10 per cent collection fees; against all of the parties establishing and foreclosing said mortgage lien on said personal property; against said London for all said sums also. And in case it be shown that he was the agent for the said Parlin & Orendorff Company, then against the said company for all said sums, instead of the said R. W. London, and for all costs against each party, and for all orders and decrees as he may be entitled to either in law or in equity, and as in duty bound will ever pray, etc."

The pleadings of appellant will be noticed, where necessary, in connection with its various assignments.

The judgment was in favor of plaintiff against Robertson according to the terms of the note; in favor of London, and against Parlin & Orendorff Company for $3000. Parlin & Orendorff Company alone appeal.

The facts and circumstances in evidence admit of what the jury must have found, viz., that London acted in the matter of purchasing and disposing of the cattle on behalf of and as the agent of Parlin & Orendorff Company.

The first and fourth assignments of error, briefly stated, are that the court erred in overruling appellant's plea that it was entitled to be sued in Dallas County on the cause of action as stated in the petition. Besides the plea, there was an exception to the petition on this ground. The plea and demurrer were filed January 2, 1899, and were not passed on at that term of the court, and there is nothing in this record to show that appellant sought to have them acted upon at that time, or any reason why they were not in law waived by this failure. On August 3, 1899, plaintiff excepted to this plea, among various reasons, upon the

ground that the plea should have been presented at the former term, and they were sustained. The court did not err in so ruling.

The fifth and sixth assignments embody the contention that the court erred in holding on plea and demurrer that there was not a misjoinder of causes of action, in this, that Robertson was sued upon a note upon which he alone was charged to be liable, and appellants and London were sued in tort for the conversion of certain property for which Robertson was in no way responsible. There could not well be any question that appellants and London would have been proper parties, in fact necessary parties, to a foreclosure of plaintiff's lien, if the mortgaged property appeared to be in their possession. The difficulty presented is the effect of the allegation and the fact that they had converted and disposed of the property and the same had been rendered inaccessible, which is probably the intendment of the allegation that the cattle had been placed beyond the jurisdiction of the court. Foreclosure upon personal property not accessible nor in existence, would be impracticable. It is, however, only through proceedings to enforce the lien that plaintiff would have the right to join appellants in the action upon the note. As an actual foreclosure sale of the property was, upon plaintiff's averments, out of the question, there is some force in appellant's claim that plaintiff's cause of action against it is solely for conversion, and distinct from the debt. But properly considered appellant's liability is not distinct from the debt, but depends upon and grows out of it. It is only by reason of the debt that the mortgagee can pursue the purchaser of mortgaged property. Such a purchaser with notice who destroys the subject of a mortgage, becomes liable to the mortgagee for the value of the property to the extent of the debt. Looking at the substance, instead of form, the consequence of such an act is to make him liable for the debt pro tanto. The authorities agree with the view of the trial judge, viz., that appellant was properly joined. Templeman v. Gresham, 61 Texas, 50; Taylor v. Felder, 5 Texas Civ. App., 417. See also Newman v. Beard, 45 Texas, 151.

The third and twelfth assignments will be disposed of by saying that where a party is entitled to sue both principal and agent for a tort committed, he may sue both or either, and can not be required to elect which one he shall prosecute his suit against; and he is not, by suing one, precluded thereby from afterwards joining the other.

We regard the thirteenth and fourteenth assignments as wholly without force. Our conclusions of fact dispose of the seventeenth and twenty-eighth. The nineteenth assignment complains of the refusal of this charge: "It devolves upon the plaintiff to prove the existence of his debt at the time of the execution of the mortgage, and it is the duty of the plaintiff, in obedience to the subpoena duces tecum served on him, to produce his books of accounts in which he has testified that all the items constituting his debt against the defendant O. B. Robertson are kept; and his failure and refusal to produce said books in obedience to said subpoena must be accepted by the jury as proof that the said books

of accounts, if furnished, would be adverse to the interest of the plaintiff." Plaintiff testified in explanation of his not having with him the books, among other things, to the fact that he lived at Waelder, eighteen miles away, and was served with the subpoena after leaving there and while at Gonzales attending this trial, and apparently not under circumstances which enabled him to have the books with him. In view of testimony of this kind, the instruction would clearly not have submitted the proper question to the jury, and would have been on the weight of evidence. The charge of the court covered the substance of the first clause of this instruction.

There was no error in what is embodied in the twenty-fifth asignment, nor in the seventeenth assignment, In regard to the latter, the court properly refused to allow defendant to use depositions of a witness taken in a different proceeding. The witness was placed on the stand in the present case by defendant, and the previous deposition of this witness was sought to be used by reading same to him for the purpose of asking him how he reconciled his testimony with said depositions. We understand that defendant's counsel sought to read them in the hearing of the jury, with a view to discrediting the witness' testimony. The bill of exceptions shows that there was no contention by defendant that they had been misled by him as to what his testimoiy would be, nor that they had been surprised thereby. We think it quite clear that the situation was not such as made an exception to the ordinary rule in such cases.

The seventh assignment asserts that the petition does not charge that appellant purchased the cattle, or sold them, or received the proceeds arising therefrom. The eighth and ninth clauses of the petition state a case as fully against appellant as against London. The proposition advanced by appellant under this assignment does not seem to be germane to it, nor to have application to the facts of this case, when something more was done than to purchase the cattle at sheriff's sale.

The tenth assignment is that the court erred in permitting F. M. Fly, the deputy sheriff who made the sale, to testify that he afterwards accused London of representing appellant in this transaction, and that London did not deny it. The grounds of the assignment are that there was no evidence in the case showing or tending to show that London represented appellant, and appellant is not bound and should not be affected by the failure of London to confess or deny the accusation, and the testimony was calculated to prejudice appellant's case. There was other testimony sufficient to establish London's agency. In view of this (Loeb v. Crow, 15 Texas Civil Appeals, 537), and in view of the court's having instructed the jury, in determining whether or not he was the agent of appellant, not to consider any statement or declaration of his, we overrule the assignment. These remarks apply also to the Twenty-fourth assignment. The instruction just referred to is attacked by the fifteenth assignment because, as it alleges, there is nothing to show that London had made any statement or declaration as to his agency, and it

tended to induce the jury to believe that from the facts in evidence the court was of opinion that London was acting in the matter as defendant's agent; and was on the weight of evidence in assuming that there were not only declarations by London on the subject, but proof of agency outside of such declarations, of which there was none. There was, we find, other proof of agency, and the vices charged to this instruction we regard as groundless from any reasonable point of view. The court had a right to proceed upon the theory that there was other testimony tending to show agency, so long as it did not undertake to pass on such testimony. There is nothing whatever in the instruction indicating the judge's views of the testimony; nor could the jury have failed to understand that the instruction, in its reference to statements and declarations, included the implied admission which the testimony of F. M. Fly tended to prove.

The eighth assignment complains of the following charge: "Although the jury should find and believe that the said defendant Robertson was indebted to the plaintiff at the time he executed the mortgage upon the cattle in controversy in the sum of money mentioned in said mortgage, or a greater sum, yet if they believe that said mortgage was executed by the said Robertson for the purpose of hindering, delaying, and defrauding his other creditors and of defeating them in the collection of their debts, and the said purpose of the said Robertson to defeat and defraud his creditors was known to the plaintiff at the time he accepted the same, and that the said plaintiff accepted said mortgage for the purpose of aiding the said Robertson in his fraudulent purpose and design, then they will find their verdict for the defendant."

There is no statement in appellant's brief under this assignment. The assignment itself refers to certain testimony as supporting the issue indicated in the charge, but appellant does not undertake to refer to the places in the record where such testimony may be found. We consider defendant's answer as pleading the matter referred to in this instruction, and although the charge itself was erroneous (Bruce v. Koch, 94 Texas, 192, 59 Southwestern Reporter, 540), it might have been regarded as a request for the submission of the issue, and it may have been the duty of the court, in view of such request, to have submitted it by a proper charge. But we are confined to the assignment, and the assignment is that the court erred in refusing the charge asked, not that, if it be erroneous, the court erred in not submitting the issue in some form. The authority just cited decides that the charge was erroneous and that its refusal was proper. Although this is sufficient, we shall add that we have examined the evidence that appellant relies on to show a fraudulent purpose of plaintiff in taking this mortgage, and we believe it is wholly insufficient to show such a purpose in this transaction. Fraud must be proved, and the rule, as generally stated, is that it must be clearly proved; and the facts and circumstances relied on must, we think, be substantial, and relevant to the transaction in question, and the judge

should refuse to submit such issue if the testimony is wanting in these respects.

The twenty-third assignment relates to the court's permitting plaintiff, in proving the agency of T. J. Clark for appellant and the extent thereof, to show from the plea to the jurisdiction in this case that he, for appellant, had signed and sworn to such plea. There was evidence to show that appellant had its headquarters at Dallas, with William M. Robinson as its general manager for Texas, and that when this officer was absent, his duties devolved on Clark, who kept appellant's books. Also that at the time of the wreck by which the cattle were injured, Robinson was absent, and Clark adjusted and settled the damages with the claim agent of the railway company. These facts were testified to by Clark and by Galbraith, the claim agent. We fail to see any error in admitting proof of the fact that Clark acted for appellant in making affidavits to its pleas in this case, as bearing on the scope of Clark's agency. The pleas were signed and sworn to by him as appellant's agent, and appellants prosecuted the pleas through its counsel. The testimony had a tendency to prove that Clark's powers were not confined to bookkeeping.

The twenty-sixth assignment presents nothing that should reverse the judgment. Appellants, it appears, offered in evidence an application made by plaintiff for a continuance, which had been made for the purpose of getting an opportunity to retake the depositions of London and Galbraith, who were therein alleged to be adverse and unwilling witnesses, and had not fully answered the questions propounded to them, which application was supported as to facts by letters of the notary who had taken the depositions. It appears from the bill of exceptions that defendant read as evidence the application without the exhibits, and the court held that plaintiff was entitled, under the circumstances, to have the exhibits read also. We think this was not error.

The verdict was as follows: "We the jury find a verdict in favor of R. L. Miller against O. B. Robertson for the sum of $2500, with 8 per cent per annum interest from the 1st day of October, 1897, until paid, and 10 per cent interest on principal and interest as attorney's fees. And we further find a verdict in favor of R. W. London, and find a verdict for the plaintiff, R. L. Miller, against the defendant the Parlin & Orendorff Company, for the sum of $2500, with 8 per cent interest per anuum from the 1st day of October, 1897, until paid, and an additional 10 per cent on principal and interest, less $120, provided this amount does not exceed $3000, the value of the cattle."

It is contended by the twenty-ninth assignment that the meaning of this verdict was that if the amount as found exceeded $3000 (which a computation shows is the case), the jury did not intend to find against this defendant at all. This is the substance of the assignment, which is the only proposition made, and we do not hesitate to construe the verdict to mean that the recovery against appellant should be $3000, the value of the cattle, if the sums named amounted to more. There was

testimony to support the finding that the cattle were worth $3000. This disposes of the twenty-ninth and thirtieth assignments. There is nothing in the thirty-first assignment of error of which appellant can complain. The judgment is affirmed.

Affirmed.

Writ of error refused.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v. J. ROSS MITCHELL.

Decided January 23, 1901.

1.—Damages—Fright and Physical Injury.

There can be no recovery of damages for fright alone, but where physical injuries result from the fright, recovery may be had on account of injuries.

2.—Same—Proximate Cause of Injury at Railway Crossing.

A failure to ring the bell or blow the whistle of a railway train when it is approaching a public crossing can not, as matter of law, be held not to be the proximate cause of a fright and consequent injuries received by a person approaching the crossing.

3.—Same—Injury Such as Should Have Been Foreseen.

Where the injury appears to be one which naturally would result from a fright, such as miscarriage by a pregnant woman, it will be regarded in law as one which should have been foreseen. See charge held not objectionable because failing to require the consequent miscarriage of plaintiff to have been foreseen as the result of her fright.

4.—Contributory Negligence—Charge of Court.

A charge that if plaintiff's wife was frightened in the manner alleged, and threatened with miscarriage, and during that time was conveyed to her home in a wagon, and the same produced or contributed to produce the miscarriage, or if the miscarriage was produced from any cause other than the fright, plaintiff could not recover, is not objectionable as excluding every act of negligence happening after the fright except that referred to in the charge.

5.—Evidence—Injury at Railway Crossing.

It was competent for plaintiff to testify that he had previously crossed the railway track at the place where the injury occurred, a public road crossing, and heard the whistle blown 400 to 500 yards before the train reached there, as this tended to show his hearing was good enough to have detected the whistle if it had been blown as he approached the crossing at the time complained of.

Appeal from Franklin. Tried below before Hon. J. M. Talbot.

Glass, Estes & King and *Sam H. West,* for appellant.

King & King and *Shepherd & Jones,* for appellee.

JAMES, CHIEF JUSTICE.—Appellee sues to recover damages for injuries to his wife resulting from a miscarriage which he alleges was caused by fright from the near approach of a passing train at a public crossing. The circumstances of the case may be best shown by stating from the testimony of plaintiff. He testified that he had his family in

a wagon, driving along the public road, and stopped about thirty or forty yards from the crossing, and looked and listened for any approaching train, and saw and heard none. That where he stopped was on the brink of a hill, and from there down to the railroad was down hill, and it was down hill until after the railroad was passed. When the horses were about ten feet of the track a passenger train appeared, no whistle having been blown nor bell rung as required by law at such places. He could not turn out of the road, nor back, as there were ditches on either side, and he drove rapidly across, in time to escape the train. He says he whipped up and went over it in front of the approaching train, believing under the circumstances it was best to do so, being afraid to stop so near the track. His wife, who was in the wagon, was a nervous woman, and was so frightened by the situation, that she almost immediately complained of her back, and the evidence is that on the night of the following day she had a miscarriage.

From the plaintiff's and other testimony in the case which the jury must, from their findings, have credited, we state as conclusions of fact that defendant's employes neglected to give any signal announcing the approach of its train at this public crossing; that such statutory negligence was the cause of the fright to plaintiff's wife; that the failure to give signals at such places would naturally tend to cause persons using the public road to come into dangerous proximity to the passing train, and thereby cause them fright, and such a result may reasonably be anticipated from such failure, and we accordingly find that such failure was the proximate cause of the fright and of the resulting personal injuries complained of. We find also that there was no contributory negligence.

Opinion.—The rule is settled in this State, that for fright alone there can be no recovery of damages, yet where physical injuries result from the fright, recovery may be had on account of such injuries. Hill v. Kimball, 76 Texas, 210; Railway v. Hayter, 54 S. W. Rep., 944; Railway v. Trott, 86 Texas, 412; Yoakum v. Kroeger, 27 S. W. Rep., 953.

It appears to us that the acts of negligence here alleged were calculated to lead persons into positions of danger at crossings which otherwise they would have avoided, and that fright to persons is a natural incident to such situations; therefore it can not be said as a matter of law that said acts were not the proximate cause of the fright or the consequent injuries to plaintiff's wife.

The second assignment complains of the instruction to find for plaintiff if, in the light of the attending circumstances, her fright, if any, ought to have been foreseen as a natural and probable consequence of the failure to give signals. The gist of this second assignment is pointedly indicated by the third, which complains of the refusal of a charge in effect that, even though negligence be shown in the failure to ring the bell or blow the whistle, plaintiff could not recover unless, in the light of the attending circumstances, *a physical injury* to plaintiff's wife ought

to have been foreseen by defendant's employes as a natural and probable consequence of such negligence.

The point, as we apprehend it, is that inasmuch as no recovery can be had for fright alone, and the injury claimed to have resulted therefrom is what gives the cause of action, the injury itself must have been one that could be foreseen as a natural and probable consequence of the negligence. The rule as expressed in Railway v. Hayter, supra, is that "where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof." Thus it seems that not merely the fright, but really the injury attending or following it, must be of a character to have been foreseen under the circumstances or a natural and probable result.

The charge, among other conditions necessary for plaintiff's recovery, required that the jury should find that the injuries alleged resulted from the fright, also that the failure to give signals was the direct cause of the fright and injury, and that "in the light of the attending circumstances her fright, if any, ought to have been foreseen as a natural and probable consequence" of such failure. The charge does not go far enough to strictly satisfy the rule above quoted from Railway v. Hayter.

It seems to us that where the injury appears to be one which naturally would result from a fright, it will be regarded in law as one which should have been foreseen. We do not have to say in this case that it is a matter of common knowledge that fright naturally tends to produce such an injury to a woman in the condition plaintiff's wife was in. There is testimony on this subject, that of Dr. Dodson, which is undisputed. He testified that sometimes a woman receives so severe a shock that nothing will prevent a miscarriage. There is other testimony on this subject. This to our minds implies that the natural tendency of a shock is to produce a miscarriage. We therefore conclude that the rights of appellant in this case were sufficiently respected by the court's requiring the jury, in order to find for plaintiff, to find that in the light of the attending circumstances her fright ought to have been foreseen as a natural and probable consequence of the failure to give signals. It was established by the verdict that the fright was the sole cause of the injuries complained of in this case, for under the charges, the jury could not otherwise have found for plaintiff.

We think the fourth and fifth assignments present questions that are plainly without merit, and therefore it is unnecessary to discuss them.

The sixth assignment is that the following part of a charge was erroneous in that it excluded from consideration every act of negligence on the part of plaintiff happening after the alleged fright, except that referred to in the charge. The following is the charge upon which this complaint is founded. "In this connection you are instructed that if

plaintiff's wife was frightened in the manner alleged, and thereafter threatened with miscarriage, and during that time was conveyed to her home in a wagon, and the same produced or contributed to produce a miscarriage, then for the physical and mental pain suffered by reason thereof plaintiff can not recover." The charge as given renders this criticism baseless, because in the same paragraph and following the above, the court added "or if plaintiff's wife miscarried and the same was caused or produced from any cause other than the fright, if any, occasioned by reason of the matters and things alleged in plaintiff's petition, then plaintiff can not recover any sum for the physical or mental pain suffered by her by reason of such miscarriage." Defendant asked a charge, the one referred to in the seventh assignment, which would have been open to the same objection it makes to the above charge, in that it singled out the failure of plaintiff to call in medical aid. This was refused, but another charge it asked was given as follows: "Although you should find that the agents of defendant in charge of its train failed to blow the whistle or ring the bell, but you further believe that the plaintiff, by the use of ordinary care, could have prevented a miscarriage of his wife, and that he failed to exercise such care to prevent or lessen the injury, and such failure contributed to the miscarriage, then for such injury plaintiff can not recover." These considerations, in our opinion, dispose also of the eighth and tenth assignments of error.

The twelfth assignment is not well taken, because it was proper to allow plaintiff to show that he had previously crossed at this place and heard the whistle blown four or five hundred yards before trains reached the crossing, as this testimony has no tendency to show negligence in these respects at the time complained of, but tended to show that plaintiff's hearing was good enough to detect the whistle if it had been blown on this occasion. Plaintiff, however, also testified in this connection (as shown by the bill of exceptions) that he had traveled the road since the injury to his wife, but did not remember whether he had noticed the whistle being blown or not. He did not testify, as is stated in this assignment of error, "that he could not remember to have heard the whistle blown." His testimony was neither that he had nor had not heard the whistle on these occasions.

The thirteenth and last assignment is that the verdict was contrary to and unsupported by the evidence. Our conclusions of fact dispose of this. The judgment is affirmed.

Affirmed.

Writ of error refused.

J. C. DABBS v. F. J. ROTHE, JR.

Decided January 16, 1901.

1.—State School Land—Actual Settlement.

Where additional State school land was purchased under article 4218f of the Revised Statutes as amended by the Laws of 1897, page 184, it was a sufficient actual settlement to comply with the Act of May 27, 1899, as to such additional land, that the purchaser settled on his home section within six months from the filing of his application therefor.

2.—Same—Curative Act of May 27, 1899—Six Months Limitation to Suit.

The provision in the curative Act of May 27, 1899, cutting off the right of a subsequent purchaser of school land from the State unless he brought suit within six months from the date of that act, does not apply where the first purchaser does not come within the class to whom relief was granted by that statute, viz., those who were not actual settlers on the land at the time of their application to buy; and hence, in a contest of title between a purchaser under the law of 1897 and a subsequent purchaser from the State it was necessary, in order to justify a peremptory instruction to the jury to find for the first purchaser on the ground that the second had not filed his suit within six months after the Act of 1899 took effect, that the testimony should show an undisputed case of failure on the part of the first purchaser to settle on his home tract before he applied to purchase the additional land, but that he did settle on one or the other within six months after he made his application to purchase.

3.—Same—Law Not Retroactive.

The Act of May 27, 1899, is not retroactive, and does not deprive anyone of vested rights.

Appeal from Medina. Tried below before Hon. I. L. Martin.

V. H. Blocker and *George Powell,* for appellant.

Ed De Montel, Denman, Franklin, Cobbs & McGown, and *W. A. Wurzbach,* for appellee.

FLY, ASSOCIATE JUSTICE.—This is an action of trespass to try title to 640 acres of land in Medina County. Appellee, in addition to the plea of not guilty, pleaded that appellant's claim to the land was based upon settlement and an application to purchase the land, which had been awarded to appellee by the Commissioners of the General Land Office prior to appellant's settlement and application. That appellee had actually settled the land and made the required payments and executed his obligation for the balance of the purchase money as required by law, and that appellant, having failed to begin his suit within six months after the Act of May 27, 1899, went into effect, was barred of his action. The court charged the jury that the action was barred, as pleaded by appellee, and instructed a verdict for appellee.

The title shown by appellant was an application to the Commissioner of the General Land Office to purchase section 296, certificate 787, Houston East and West Texas Railway Company, price $1 per acre, classed as dry grazing land, the application for said section being as an actual settler.

The Act of 1899, above referred to, is as follows:

"Section 1. Be is enacted by the Legislature of the State of Texas: That any applicant who has, prior to the first day of January, 1899, made application to purchase public free school, university, or asylum lands, and within six months after the date of such application to purchase made actual settlement and first payment thereon, and executed his obligation for the balance of the purchase money, and the said land has been awarded to such applicant by the Commissioner of the General Land Office, under the several acts of the Legislature relating to the sale of such lands, and the said award and the account as to interest payments on such land is in good standing, such award and sale is hereby validated, and the Commissioner of the General Land Office shall issue to such purchaser, his heirs and assigns, patent thereto, upon the payment of the purchase money, both principal and interest, together with patent fees, and upon satisfactory proof that all taxes have been paid upon such lands, and that such land has been occupied for three years by said applicant or his vendee, after the date of his application; provided, that the provisions of this act shall not in any manner disturb the vested rights of those claiming an adverse claim or title by reason of settlement and application to purchase as against the purchaser to whom the same was awarded by the Commissioner of the General Land Office; and provided further, that all persons claiming, by reason of settlement and application to purchase, an adverse title or rights to such land as against the purchaser to whom the same is awarded by the Commissioner of the General Land Office, shall begin his suit to recover such land within six months after this act takes effect, and not thereafter."

The act in question was passed, as is shown by section 2 of the act, for the benefit of those who were settlers upon and owners of school lands at the time the act took effect, but "who were not actual settlers thereon, as the term is construed by the courts, before making their application to purchase, and who have been forced to leave their lands by circumstances beyond their control." If appellee belonged to the class named in the act, then, under its provision, he has a claim that can be perfected into a title by proof that the land has been occupied for three years after the date of the application to purchase, and proof of payment of purchase money, principal and inteerst, and taxes and patent fees. One class of persons is exempted from the operation of the law, and that is the one against whose claim on the land has intervened the claim of another who has settled on the land and applied for purchase of it. The intervening rights of such settler and applicant are protected, however, upon condition that he shall begin his suit against the person to whom the land had been awarded within six months after the act went into effect. The act went into effect on August 25, 1899, and the suit was filed March 7, 1900, more than six months after the act took effect.

It was in proof that appellee made his application to purchase the

land on June 14, 1898, and it was, on August 27, 1898, awarded to him. He has made all payments required by law, and executed the necessary obligations.

The land was purchased under the provisions of article 4218f, Revised Statutes, which permits the purchase of additional lands by any actual bona fide purchaser of and resident upon any other lands within a radius of five miles thereof. In article 4218ff it is provided that a forfeiture of the part on which he resides shall work a forfeiture of his title to the additional land bought.

It is urged by appellant, in the third assignment, that appellee had not made an actual settlement on the land in controversy as a home within six months from the filing of his application as contemplated in the Act of May 27, 1899, and that the limitation provided for in that act is unconstitutional as affecting vested rights. As to the first point, it was not essential that appellee should show settlement upon the land in controversy. Settlement within six months upon the home tract was sufficient.

It is also contended in the fifth assignment of error that the evidence establishes that appellee failed to bring himself within the reach of the relief granted by the Act of 1899, by not becoming an actual settler on the land claimed as a home, within six months from the time he applied for it in June, 1898.

The evidence introduced by appellee tends to show that he went into possession of the home section before he applied for purchase of it and the other land, in 1898, and was an actual settler thereon before that time, and was not in a position to require relief from an act passed to relieve those who were not actual settlers before the purchase of the land was applied for. If the phase of case established by appellee's testimony be the true one, then appellant had not obtained any right by settlement and application to purchase that could form the basis of a suit, and judgment should have been rendered for appellee.

On the other hand the testimony of appellant tended to show that there had been no actual settlement, either before the time of the application or thereafter, and if this should be true, the settlement and application of appellant would give him the right to recover, whether he instituted his suit within six months or not. The limitation of six months provided for in the Act of May 27, 1899, has no reference to any case except where actual settlement is made within six months after the application was made.

It appears, therefore, that in order to justify an instruction to find for appellee on the six months' limitation, the testimony should have shown an uncontroverted case of failure upon the part of appellee to settle upon the home tract before he applied for the purchase of the land in controversy, but did settle one or the other within six months after he made his application to purchase.

It shauld have been submitted to the jury as to whether Rothe was an actual settler of the land before the time he made his application to

purchase or not, and if he was, he would be entitled to the land, if he had not abandoned it at the time that Dabbs made his settlement and application. If Rothe was not an actual settler before or after the application for the purchase, then the jury should have been instructed to find for Dabbs, as it was uncontroverted that the latter was an actual settler and had made his application in compliance with law. If, however, Rothe was not an actual settler before he made his application to purchase, but became one within six months after he made his application, then the jury should have been instructed to find for Rothe on the ground that Dabbs was barred by limitation of six months under the provisions of the law of 1899.

It follows that the court errer in not submitting the issues raised by the evidence to the jury.

The Act of May 27, 1899 (General Laws of Twenty-sixth Legislature, page 259) is not retroactive, and does not deprive any one of vested rights. Statutes of limitation affect the remedy alone, and so long as there is a substantial remedy left there is no cause for complaint, as such laws form no part of the contract. Gautier v. Franklin, 1 Texas, 732; Goldfrank v. Young, 64 Texas, 432.

In our former opinion in this case nothing was considered but the form of application to purchase made by appellant, and it was held to form no basis of title, under the authority of Gracy v. Hendrix, 93 Texas, 26, and Willoughby v. Townsend, 93 Texas, 80. The record purports to give only the substances of the application, and it was not attacked in any manner by appellee in this or the trial court. We have concluded, therefore, that the application should be treated as complying with the law, and a rehearing is therefore granted, and the opinion withdrawn, and for the reasons hereinbefore given, the judgment is reversed and the cause remanded.

Reversed and remanded.

TEXAS PACIFIC RAILWAY COMPANY v. IRENE MARTIN ET AL.

Decided January 23, 1901.

1.—Action for Death—Recovery by Married Daughter.

A married daughter, being within the class named by the statute, is entitled to recover damages for the death of her father, although he was not then bound to contribute to her support.

2.—Same—Amount of Damages—Gratuitous Contributions by Father.

Although the sums given by the deceased to his daughter were gratuitous contributions, in irregular amounts and at irregular intervals, it was for the jury to decide from the evidence what amount she might reasonably have expected to receive from him.

3.—Same—Evidence—Place of Death.

Evidence that deceased was killed "in Sherman" is sufficient to establish that the death occurred within the corporate limits of that city.

4.—Same—Negligence and Contributory Negligence.

See the opinion for evidence held sufficient to show that deceased who, while

walking along a railroad side track, was run over by a train, was not guilty of contributory negligence, and also to show that the operatives of the train were guilty of negligence in failing to stop it.

Appeal from Wood. Tried below before Hon. J. G. Russell.

Cate, Geddie & Bruce, for appellant.

F. J. McCord and *M. D. Carlock,* for appellees.

FLY, ASSOCIATE JUSTICE.—Appellee, a daughter of Z. Parker, deceased, joined by her husband, W. J. Martin, instituted this suit against appellant to recover damages for the death of her father. The trial resulted in a verdict and judgment in favor of appellees for $1000.

The first and second assignments of error contest the right of a married daughter to recover for the death of her father, because there was no obligation on his part to contribute to her support. The contention is devoid of merit. The statute does not provide that damages can be recovered for a death caused by negligence only in those cases where the deceased was bound to contribulte to the support of the plaintiff, but it names the persons who can recover damages, which are to be proportioned to the injury resulting from such death. Rev. Stats., arts. 3021-3027.

When one of the persons named in the statute institutes suit, the only test as to amount of the damages is the amount of injury resulting from such death. The Texas reports contain many cases in which verdicts have been sanctioned where no obligation on the part of the deceased to contribute to the support of the plaintiff existed, and the difference in the measure of damages that prevails when no obligation exists to contribute to the support of plaintiff and when it does so exist has been laid down many times. Railroad v. Kindred, 57 Texas, 491; Railway v. Harrington, 62 Texas, 597; Railway v. Lee, 70 Texas, 496; Railway v. Hughes (Texas Civ. App.), 54 S. W. Rep., 264; Railway v. Power, 54 S. W. Rep., 629.

The special charges instructing a verdict for appellant on the ground that the evidence did not show that plaintiff had sustained actual damages of a fixed character was properly refused by the court. The contention of appellant is that because the sums contributed by deceased to the support of his daughter were given gratuitously, at irregular intervals and in irregular sums, appellee could not recover. There is no such rule of law, and to have given the charge would have been a gross invasion of the exclusive rights of the jury to pass upon the facts. It was for the jury to decide from the evidence what sums appellant might reasonably have expected to receive from her father, and in arriving at a conclusion on this subject they could take into consideration the sums that had been contributed before his death, whether they had been given in stated amounts at stated times or not. Railway v. White, 56 S. W. Rep., 204; Railway v. Power, 54 S. W. Rep., 629.

An ordinance of the city of Sherman prohibiting the running of locomotives or cars at a greater rate of speed than six miles an hour within the city limits was introduced in evidence without objection, and in a special charge appellant requested that the jury be instructed not to consider the ordinance, and it is contended that the refusal of the court to give the charge was error, because there was no evidence that the accident occurred within the corporate limits of the city of Sherman. The uncontroverted evidence shows beyond a reasonable doubt that the accident did occur within the limits of the city of Sherman. Mrs. Martin swore: "He was killed by the Texas & Pacific Railroad in Sherman, Grayson, County, Texas." Herschel Reeder said: "I knew a man by the name of Parker, and suppose it was Z. Parker, who was killed in Sherman on or about the 19th day of January, 1899." Jim Harrison swore: "I witnessed the accident in which Z. Parker was killed, at Sherman, Texas, a little over a year ago."

A number of other witnesses swore to the same fact. The question as to the rate of speed at which the cars were moving when Parker was killed is not raised by the assignment of error.

The issue as to whether deceased was guilty of contributory negligence was submitted in the charge of the court, and no complaint is urged against the charge of the court on that phase of the case, nor on any other, and we think that the jury had testimony upon which to base a finding that deceased was not guilty of contributory negligence. At the time of the accident deceased was walking along the track of appellant, on a route pursued by the public in going in the direction that he was going. He was hard of hearing. He was on a siding about thirty-five feet from the main line when struck by a car that was backed on the siding by a locomotive, and as deceased sprang off the track he was struck by a piece of iron and knocked down and was run over and mangled by the car. Some of the witnesses swore that they called to deceased to get off the track as the car came down the siding, and the brakeman yelled to the deceased to get off, but although he was seen by the brakeman in time to have stopped the car, no effort was made to stop until the car was upon deceased, when it was immediately stopped on a signal given by the brakeman to the engineer. The cars were being moved about on the main track just before the accident, and it is inferable that the deceased turned off on the side track to avoid them. There was no evidence that a whistle was blown or bell rung at or before the time deceased was struck. We conclude from the testimony that appellant's employes saw deceased on the side track, and could have stopped the car and avoided injuring him, but without warning ran over and negligently killed him. Railway v. Phillips, 37 S. W. Rep., 620; Railway v. Harvin, 54 S. W. Rep., 629; Railway v. Brown, 14 Texas Civ. App., 697. We do not consider the verdict excessive.

The judgment is affirmed.

Affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v. W. J. MAYFIELD.

Decided January 23, 1901.

Master and Servant—Assumed Risk—Knowledge of Danger.

Plaintiff, an employe, was engaged in removing cinders, using a wheelbarrow which he trundled across a temporary bridge of three planks recently constructed there by the foreman for that purpose. Because the ends of the planks were not secured, they slipped, causing plaintiff, who did not know of such defect, to fall and be injured. Held, that it was a question of fact for the jury, and not of law, as to whether plaintiff should be charged with knowledge of the defect.

Appeal from Titus. Tried below before Hon. J. M. Talbot.

Glass, Estes & King and *Sam H. West,* for appellant.

Humphrey & McLean, W. P. McLean, Jr., B. Ralston, and *Sheppard, Jones & Sheppard,* for appellee.

JAMES, CHIEF JUSTICE.—The action was to recover damages for personal injuries sustained by appellee in appellant's service. He alleged that he was set to work removing cinders from one part of defendant's premises to another, across a bridge that had been constructed by defendant for the purpose. That said bridge had been constructed over iron water pipes which had been used by defendant and which had been laid by defendant on the ground and which could not be crossed by plaintiff in removing the cinders in a wheebarrow without being bridged over. That while engaged in pushing the wheelbarrow with cinders over this bridge, a portion of the bridge gave way and fell, thereby overturning the wheelbarrow and causing plaintiff to fall and become injured. That the bridge gave way because it had not been properly constructed and provided with supports necessary to make it a safe crossing for plaintiff in performing his work. Plaintiff alleged he did not know of any defect or danger in the structure, and makes allegations of negligence on defendant as the cause of his injuries, and the absence of negligence on his part.

Defendant pleaded general denial, and that the condition of the bridge as to danger, etc., was apparent and known to plaintiff; that he had equal means with defendant to know of any danger therein; that he assumed the risk, and was guilty of contributory negligence. Verdict for plaintiff.

From testimony in the record it appears that plaintiff was working for defendant at the pumphouse at Mount Pleasant, and under direction of its foreman was engaged in moving cinders as above indicated. Plaintiff first used a bridge with two pieces of plank which he had securely constructed over the water pipes, about twenty feet below where he was hurt. On May 4, 1899, while plaintiff was doing some other

work on the place, the foreman took these planks and built the bridge at a place about twenty feet away, where plaintiff was afterwards hurt. This new bridge was built by placing one end of a plank about seven to ten feet long on the ground, and the other end on a pipe; and the same way with the other plank on the opposite side. He then took a plank about six inches wide and laid it between the ends of the planks which rested on the middle pipe to level the bridge on top of the pipes. He did not fasten the ends of the planks on top of the pipes. The ends resting on the ground were imbedded in the ground, and could not slip back. There was nothing to secure the ends of the planks on top of the pipes, which could have been done, as testified to by plaintiff, by nailing a strip underneath from one plank to the other, or to have driven stobs down by the planks in the lower side, or by building the bridge where there was a union of these pipes and making a shoulder out of the sleeves and collars, as plaintiff testified he had done with the one he built. Plaintiff testified that he did not know that the planks had not been made secure in some way; that Mr. Adams, the foreman, built the bridge and directed him to use it in rolling cinders, and he assumed that it was safe and all right; did not examine underneath to see, and there was nothing about it that led him to believe that it was unsafe, and it was after he was hurt that he found there was nothing to keep the planks from slipping. That he began using this bridge late in the evening of May 4th, and rolled about half a dozen barrows over it that evening, and next morning about 7 he began again and worked until he was injured, between 9 and 10 o'clock that morning, by one of the planks slipping and causing him to fall. His details of the manner and results of his injuries need not be stated her. It does not conclusively appear that the accident was due to the condition of the wheelbarrow, nor that it was negligently handled.

Appellant's tenth asignment of error is the only one presented in its brief. We here copy it: "The court errer in overruling defendant's motion for a new trial on the tenth ground set out therein, because the verdict of the jury is contrary to and unsupported by the evidence. Because the undisputed facts show that the bridge was reasonably safe for the purposes for which it was used. That it was constructed of sound and substantial material. That plaintiff's foreman, Adams, could not have anticipated or foreseen a probable injury to plaintiff by the slipping of the plank sideways. That the bridge was only eighteen inches high at the highest point, and was open to the view of plaintiff, and the plaintiff knew, and had the means of knowing, as much of its condition and construction and the probability of its slipping as the foreman, Adams. The bridge did not slip and cause the fall of plaintiff on account of any fault in his construction or in the material used, but on account of a wheelbarrow and the surging of Mayfield thereon. All of which could not have been foreseen or anticipated by the foreman, Adams. And all as more fully set out and specified in defendant's tenth ground of its motion for a new trial."

The only respect in which there could be any reasonable claim that the verdict was contrary to the evidence, is in the contention that under the testimony plaintiff must be held to have known the actual condition of the bridge, and of the danger from which he received his injury.

The testimony fairly and reasonably admits of a finding therefrom that plaintiff did not know the defective condition of the bridge, and it can not be said that in the ordinary discharge of his duty he necessarily must have known of it. Railway v. Hannig, 91 Texas, 34. He did not construct the bridge, and his use of it had been of brief duration up to the time of his injury. It was not his duty to inspect it; that duty devolved on the master, and ordinarly he would have the right to assume that the master had exercised reasonable care to make it safe for the purposes of the work. Whether he should be held to have known of its defects under all the circumstances was a question of fact and not of law.

It is true that cases arise in which the servant is charged with knowledge of apparent defects and dangers. For example, such rule has been applied in respect to tools with which the servant works. These he handles and constantly sees, and it can be said that he must necessarily know their state as to defects that are obvious. Wacksmuth v. Shaw, 76 N. W. Rep., 497. There may be, and probably are, other cases wherein the employe would be held to have known the danger. But the rule is not applicable to the facts of this case. The several propositions of law advanced in appellant's brief are sound, but under the evidence here they can be applied only in connection with issues of fact, which must have been properly submitted, as there is no complaint in this respect.

The judgment is affirmed.

Affirmed.

Writ of error refused.

W. G. FLEMING ET AL. v. C. C. BALL ET AL.

Decided January 23, 1901.

1.—Execution Sale After Defendant's Death.

A sale of land under execution, made after the death of the judgment defendant, is void, although eight years have elapsed since his death and no administration has been had on his estate.

2.—Same—Creditor's Remedy After Death of Defendant.

Where a judgment debtor dies, if the judgment is not proven up and paid in the course of administration on his estate, as provided in Revised Statutes, article 2332, the holder of the judgment should, after the time for administration has elapsed, sue the heirs for the debt and to revive the judgment.

3.—Same—Trespass to Try Title—Equitable Relief.

Where purchasers of land at an execution sale void because made after the death of the judgment defendant, sue his heirs in the ordinary form of trespass

to try title, asking no equitable relief, the rule that the purchase money paid for the land at the void sale must be repaid before title will be decreed to the heirs has no application, and whoever shows the superior legal title to the land must prevail.

Appeal from Franklin. Trial below before Hon. J. M. Talbot.

P. A. Turner, for appellants.

King & King and *Chas. S. Todd,* for appellees.

FLY, ASSOCIATE JUSTICE.—This is an action of trespass to try title to a certain tract of land off the Daniel Buie survey, instituted by W. G. Fleming and C. C. Carr against C. C. Ball and Mrs. Elizabeth Spradlin. The cause was tried by the court and judgment rendered in favor of appellees.

Appellants claim the land through a sheriff's deed, dated July 7, 1896, which was executed by virtue of an order of sale issued in a case styled J. L. Rutherford v. J. P. Spradlin, which order of sale was issued eight years after the death of J. P. Spradlin. No administration was ever had on his estate. No money was paid by the purchasers at the sheriff's sale, but the amount due on the judgment was credited on a debt due by W. J. Spradlin, son of J. P. Spradlin, to C. C. Carr.

Mrs. Elizabeth Spradlin is the widow of J. P. Spradlin, and C. C. Ball claimed the land through a bond for title from her and the children of J. P. Spradlin. There is but one assignment of error, and under it is submitted the following proposition:

"A sale of land under an order of sale issued on a judgment for money and establishing and foreclosing a vendor's lien on said land, is not absolutely void because the sole defendant in said judgment was dead at the time said order of sale was issued, there being no administration on said estate, and no possibility of one, more than four years having elapsed since the death of the defendant in the judgment."

The proposition is based upon the facts in proof, and presents the only point in the case. There has been some conflict of opinion in Texas on the questions involved, but we think that the correct ruling was made by the district judge, and that the sale under the judgment made after the death of the defendant was void.

A review of the Texas cases shows that the point at issue was first passed upon in the case of Conkrite v. Hartt, 10 Texas, 140, and it was held that a sale of land made after the death of a defendant under an execution issued before his death, was void, and that no tittle was acquired thereby. That decision was affirmed in Robertson v. Paul, 16 Texas, 472; Boggess v. Lilly, 18 Texas, 200; Chandler v. Burdett, 20 Texas, 42; McMiller v. Butler, 20 Texas, 402; Emmons v. Williams, 28 Texas, 778; Cook v. Sparks, 47 Texas, 28; Meyers v. Evans, 68 Texas, 466; Schmidtke v. Miller, 71 Texas, 103; Northcraft v. Oliver, 74 Texas, 162; Hooper v. Caruthers, 78 Texas, 432.

The decision in Conkrite v. Hart was first questioned in Webb v. Mallard, 27 Texas, 83, where Justice Moore expressed a doubt as to its correctness. In Taylor v. Snow, 47 Texas, 462, the decision in Conkrite v. Hart is attacked and overruled through a decision rendered by the same judge who wrote the opinion in Webb v. Mallard. In Cain v. Woodward, 74 Texas, 549, it was held that Taylor v. Snow had overruled the previous decisions on the subject, and it was concluded that a sale of land made under an execution issued after the death of a sole defendant was merely voidable. The opinion was delivered by the Commission of Appeals and adopted by the Supreme Court. It is interesting to note that in the same volume, page 162, in the case of Northcraft v. Oliver, it is said by the Supreme Court: "The evidence in this case shows that the execution under which defendants hold was issued after A. T. Oliver's death, and for that reason was void."

The last decision on the subject is found in Hooper v. Caruthers, 78 Texas, 432, where, after reviewing the Texas authorities, it is said: "Giving technical effect to a judgment, the case of Taylor v. Snow was probably correctly decided on its facts; but we are of the opinion that the law is correctly stated in the other cases referred to, and that a sale made under execution against a deceased person after his death, he being alive at the time judgment was rendered, is void in the sense that it is wholly inoperative to pass title to or against anyone, and therefore may be attacked directly and collaterally."

It is expressly provided in article 2332, Revised Statutes, which was enacted in 1853, that "where a sole defendant dies after judgment for money against him, execution shall not issue thereon, but the judgment may be proved and paid in due course of administration." In this case the time had elapsed in which administration could be had on the estate of J. P. Spradlin, and appellants should have sued the heirs for their debt, or to revive the judgment that had been abated by the death of the defendant. McCampbell v. Henderson, 50 Texas, 610; Low v. Felton, 84 Texas, 378. This is an ordinary action of trespass to try title, no equitable relief being asked by either of the parties, and the rule announced in Northcraft v. Oliver, above cited, and reiterated in Halsey v. Jones, 86 Texas, 488, to the effect that in cases like the one before us the purchase money paid for the land at the void sale must be repaid before title will be decreed to the heirs, can have no application. In this state of pleadings "whoever showed the superior legal title to the land was entitled to a judgment, notwithstanding facts may have existed which, if properly pleaded and proved, would have entitled plaintiffs to some affirmative equitable relief should it appear that appellee held the superior legal title." Groesbeck v. Crow, 85 Texas, 200.

The judgment is affirmed.

Affirmed.

Writ of error refused.

JOHN V. HUGHES v. WAPLES-PLATTER GROCER COMPANY ET AL.

Decided January 23, 1901.

1.—Conspiracy—Fraud—Hearsay Evidence.

Where the evidence sufficiently established an alleged fraudulent conspiracy, declarations made in pursuance thereof by one of the coconspirators were admissible in evidence over the objection that they were hearsay.

2.—Same—Proof of Conspiracy.

Upon an issue of fraud and for the purpose of showing the interest of a defendant and his motive for entering into the alleged conspiracy, by which the property in controversy was purchased at a collusive sale, the charter of a mercantile company showing on its face that he was a stockholder therein (such company having bought the property at that sale) may be given in evidence.

Error from Hunt. Tried below before Hon. Howard Templeton.

Alexander & Thompson, for plaintiff in error.

Neyland & Neyland and *W. H. Allen,* for defendants in error.

NEILL, ASSOCIATE JUSTICE.—So far as the questions to be determined between the parties to this writ of error are concerned, this case may be regarded as a suit in equity brought by defendants in error as creditors of one George W. Hardin, having a mortgage upon the real estate involved, the property of their debtor, to cancel and set aside a sale made by a substitute trustee by virtue of a prior mortgage, upon the ground that such sale was fraudulently made in pursuance of a conspiracy entered into between the plaintiff in error, the substitute trustee, and one J. H. Cook, for the purpose of defrauding defendants in error and depriving them of their lien on said property.

The court, before whom the case was tried without a jury, set aside the sale and canceled the deed made by the substitute trustee to plaintiff in error, John V. Hughes, and after decreeing a lien upon the property in favor of the latter by virtue of the mortgage under which such sale was made, to the extent of the indebtedness secured by said mortgage, it then, subject to said lien, decreed a foreclosure of their subsequent lien in favor of defendants in error.

The following, which we adopt, are the conclusions of fact (from which may be seen more fully the nature of this case) found by the trial judge:

"1. On and prior to the 22d day of November, 1894, one G. W. Hardin was a merchant doing business in the town of Quinlan, Hunt County, Texas, and that on said date he was insolvent, and was indebted to divers firms and persons and corporations, among them he was indebted to Powers Lumber Company in the sum of $1625 and interest, and to Hughes Bros. Manufacturing Company, of which corporation John V. Hughes, one of the defendants herein, was president, in the sum of $825 and interest, and to the Waples-Platter Grocer Company in

the sum of $1125 and interest. That in order to secure the above named and other creditors, the said G. W. Hardin did, on the 22d day of November, 1894, make, execute, and deliver to Garnett N. Hardin, as trustee, a deed in trust for the benefit of the said creditors to the land in controversy and a stock of goods, ware, and merchandise in Quinlan, Hunt County, Texas.

"2. That at the time of the execution of the said deed of trust by the said G. W. Hardin, there existed two prior liens on the land in controversy; one in favor of G. M. Lumpkin for the sum of $238.80 and interest on the same, and one in favor of the Western Securities Company for the sum of $900.

"3. That shortly after the failure of G. W. Hardin and the execution of said deed to Garnett N. Hardin, the trustee sold the stock of goods, wares, and merchandise to Mrs. Ann Hardin, and there was thereupon organized a corporation known as the Quinlan Mercantile Company, with J. H. Coke as manager, and the business was conducted in a building on the land in controversy, and in the same house occupied by G. W. Hardin at the time of his failure and the execution of his trust deed, and Hughes Bros. Manufacturing Company and G. W. Hardin were interested in said corporation.

"4. That some time during November, 1895, John V. Hughes, president of the Hughes Bros, Manufacturing Company, one of the beneficiaries in the deed in trust executed by G. W. Hardin, and who had accepted said instrument, and J. H. Cooke and G. W. Hardin, conspired together to fraudulently procure the secret sale under the said prior lien of the Western Securities Company of the land in controversy, and to enable and procure John V. Hughes, the president of the Hughes Bros. Manufacturing Company, one of the accepting beneficiaries of the deed of trust executed by Hardin, to purchase said land in controversy and defraud the other beneficiaries and creditors of Hardin out of same; that they, acting together in said collusion, procured the secret appointment of S. J. Mason as substitute trustee in the deed of trust to the Western Securities Company, and that, acting together in fraud of the other creditors, they did fraudulently procure the secret sale of said property, and that John V. Hughes became the purchaser of the same for the sum of $900; said J. V. Hughes paying said $900 by the check or draft of Hughes Bros. Manufacturing Company on National Exchange Bank of Dallas, and that said sale was made during the pending of the suit.

"5. That after the purchase of said property by said John V. Hughes, he sold various lots of said property conveyed by said G. W. Hardin to said Garnett N. Hardin, trustee, and in which the beneficiaries had an interest, and from said sales realized a sufficient sum which, subtracted from the $900 and interest thereon paid by him for said superior lien, would leave the said John V. Hughes entitled to the sum of $291.65, the amount for which judgment was rendered in his favor, together with a foreclosure of his mortgage lien.

"6. That Powers Lumber Company acquired a lien on the land in controversy by virtue of the deed in trust executed by G. W. Hardin to Garnett N. Hardin, trustee, and its acceptance thereof; and that the Waples-Platter Grocer Company acquired a lien on said land by virtue of same instrument and its acceptance thereof; and that G. M. Lumpkin had a superior lien to either of these; and that W. H. Berry had a superior lien on the lots in Roberts to either of the above named parties for the sum of $170."

Conclusions of Law.—1. Certain declarations of J. H. Cook, an alleged coconspirator of plaintiff in error in the procurement of the fraudulent sale, were introduced in evidence over the latter's objection that such declarations were hearsay. The action of the court in admitting the declarations over such objection is made the basis of the first, second, and third assignments of error. That such declarations were hearsay being the only ground of objection to their introduction, it may be assumed that the evidence sufficiently established the alleged fraudulent conspiracy between the parties, and that such declarations were made in pursuance and furtherance of such conspiracy. And upon this assumption, which is fully borne out and warranted by the record, such declarations were unquestionably admissible in evidence. Gas Co. v State, 22 Texas Civ. App., 118.

2. Upon the issue of fraud and for the purpose of showing the interest of plaintiff in error and his motive for entering into the conspiracy, the charter of the Quinlan Mercantile Company, which shows upon its face that he was a stockholder and charter member, was properly admitted in evidence.

3. The decree of the court is fully supported by the pleadings and sustained by the evidence, and as no error is assigned which requires its reversal, it is affirmed.

Affirmed.

Writ of error refused.

J. E. & C. A. MATTISON v. SOVEREIGN CAMP WOODMEN OF THE WORLD ET AL.

Decided January 30, 1901.

Mutual Benefit Insurance—Death of Beneficiary Without Designation—Right of Wife.

A certificate in a mutual benefit order was issued to M., a member, payable at his death to his mother. M. afterwards married and died after the death of his mother, without having designated any other beneficiary. The constitution of the order provided that at the death of a beneficiary member the sum specified in the certificate shall be paid to the person named therein, who should be "his wife, children, adopted children, parents, brothers, sisters, or other relatives," and in case the certificate was payable to one of such relatives who should, at the time of the death of the member, be also deceased, and no designation or change had been made by the member in writing upon his certificate during life,

it should be paid "to the next living relative in the order named in this section." Held, that the certificate was payable to M.'s wife, to the exclusion of his brothers, as she was next in order of relationship, although not, as were "brothers," named next after the mother, the original beneficiary.

Appeal from Franklin. Tried below before Hon. J. M. Talbot.

S. D. Goswick, Glass, Estes & King, Sheppard & Sheppard, and *J. F. Jones,* for appellants.

Chas. S. Todd and *King & King,* for appellees.

FLY, ASSOCIATE JUSTICE.—Mrs. Mary C. Mattison instituted this suit against Sovereign Camp Woodmen of the World, a mutual benefit society, to recover the sum of $1000 alleged to be due by reason of the death of her husband, James P. Mattison, who held a certificate for that amount in the society. The organization or society admitted its liability for the payment of the thousand dollars, but alleged that there was a contest, as to who should receive the money, between Mrs. Mattison and appellants, the brothers of deceased, and it asked leave to pay the money into court and that the court determine to whom it belonged. The appellants intervened in the suit, claiming to be the beneficiaries in the certificate. The cause was tried by the court and judgment rendered in favor of Mrs. Mattison.

James P. Mattison had a benefit certificate in the society for the sum of $1000, of date August 4, 1896, Annie Mattison, a widow, the mother of said James P. Mattison, being named as the beneficiary in the certificate. On June 15, 1898, J. P. Mattison was married to Mary C. King. Mrs. Annie Mattison, the beneficiary named in the certificate, died on March 17, 1899. On April 24, 1899, James P. Mattison died without designating another beneficiary, and left surviving him his wife, Mary C. Mattison, and his brothers, the appellants herein.

Section 3 of the constitution of the society, which was in force at the time the certificate was issued and at the time of the death of J. P. Mattison, provides that at the death of a beneficiary member the sum specified in the certificate shall be paid to the person or persons named therein as beneficiary or beneficiaries, which shall be "his wife, children, adopted children, parents, brothers, sisters, or other relatives." It is further provided in the same section: "In case said benefits are payable to one of the relatives named herein, who shall, at the time of the death of the member, be also deceased, and no designation or change has been made by the member in writing upon his certificate during life, the benefits shall be due and payable to the next living relative in the order named in this section. If there be no relative surviving, the said benefits shall be forfeited to and remain in the beneficiary fund of the jurisdiction."

It has been held in some States, as well as in England, that the word "relative" in its legal and technical sense includes neither husband or wife. Esty, Admr., v. Clark, 101 Mass., 36; Storer v. Wheatley, 1 Pa.

St., 506; Kimball v. Story, 108 Mass., 582; Bacon, Ben. Soc., sec. 260a. There are authorities, on the other hand, in which it is held that in construing statutes as to benefit societies the term "relative" should include those popularly known as such, as the wife or the wife's nephew, or a stepson. Bennett v. Van Riper (N. J.), 22 Atl. Rep., 1055; Simcoke v. Grand Lodge A. O. U. W. (Iowa), 51 N. W. Rep. 8.

Some difficulty might occur in choosing from the conflict of authority the proper signification of the term "relative" as used in the certificate, had not all difficulty been removed by the wife being designated as one of the relatives, in the certificate, and by the further provision that the nearness of the relationship to the deceased shall be determined by the order in which the relatives are named in the crtificate. In the order named the wife takes the first place as the next living relative. Giving a proper construction to the words "next living relative in the order named," we do not think it can with any degree of reason be contended that it was intended that the relative named after the dead beneficiary should be the one to whom the money should be paid. On the other hand it seems clear that the relative referred to is the one next to the deceased in relationship as named in the certificate, and not the one next to the dead beneficiary. If the theory contended for by appellants were the correct one, and the last relative indicated, that is, a sister, were named in a certificate, the money would pass to a relative in a distant degree, rather than to the wife, children, parents, or brothers and sisters of the deceased. Or in case there were no other relativss in the order named next to the dead sister, the certificate would fail altogether. The admission of testimony as to report of the committee of the society deciding that the money belonged to Mrs. Mattison, and the letter to her from the chairman of the finance committee, was doubtless erroneous, but it was harmless, as under the terms of the certificate no one except Mrs. Mattison was entitled to the money.

The judgment is affirmed.

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY v. W. H. WALKER.

Decided January 30, 1901.

1.—Deposition—Return—Caption.

It is not a substantial objection to a deposition that the answers are not attached to the commission, and have no caption except "Answers to Interrogatories," where they are returned together in the same package, indorsed as the depositions of the witnesses named.

2.—Same—Name of Witness—Initials Used.

A deposition is not inadmissible because the interrogatories were propounded to Gerald Mullins, and the answers were signed G. C. Mullins, the indorsement on the envelope in which the officer returned them showing the deposition to be that of Gerald Mullins.

3.—Interstate Shipment—Cases Overruled.

The cases of Houston Direct Navigation Company v. Insurance Company, 89 Texas, 1, and Railway v. Sherwood, 84 Texas, 133, as to the right of railway companies in interstate shipments to make contracts exempting themselves from liability, have been overruled by the later cases of Railway v. Solan, 169 United States, 133, and Armstrong v. Railway, 92 Texas, 117.

Appeal from the County Court of Bowie. Tried below before Hon. R. H. Jones.

F. H. Prendergast, for appellant.

Chas. S. Todd, for appellee.

JAMES, CHIEF JUSTICE.—Walker shipped three cars of cattle over appellant's road from Texarkana to Ranger, Texas. Appellant's pens where the cattle were loaded and delivered for shipment were in Arkansas. The action is for injuries to the cattle while en route, by negligent handling, some being killed and others injured. There is evidence that the cattle were in good condition when loaded, and that the cars were not overloaded. There is also testimnoy to the effect that the cars at more than one station were roughly handled in switching about, knocking the cattle down, and inflicting such injuries upon them as are alleged in the petition.

The first assignment is that the court erred in admitting the depositions of I. N. Dillard and G. C. Mullins. The interrogatories were propounded to I. N. Dillard and Gerald Mullins. The package containing the commission and depositions was properly indorsed as the depositions of I. N. Dillard and Gerald Mullins. The answers were not attached to the commission. The answers had no caption except the words "Answers to interrogatories." Those of Mullins were signed G. C. Mullins, and not Gerald Mullins. The certificates of the officer read: "I * * * do hereby certify that the foregoing answers of I. N. Dillard, the witness before named, were made before me and were sworn to and subscribed before me by the said witness." The certificate relative to the other was in the same form and appears to have named the witness as Gerald Mullins.

The fact that the answers were not attached to the commission can be no substantial objection. They were returned together and necessarily related to each other.

The only certificate which the statute prescribes in the taking of depositions is that the officer shall certify that the answers of the witness were signed and sworn to by the witness before him. A caption is not prescribed, though commonly and properly used.

The only really substantial objection was that the answers were signed G. C. Mullins, instead of Gerald Mullins. The certificate shows that they were answers of Gerald Mullins, and this is entirely consistent with the signature of G. C. Mullins. Besides, the indorsement on the

envelope, which is a necessary act of the officer, shows it to have been the deposition of Gerald Mullins. The assignment is not sustained.

The next assignment presented is based upon the theory of interstate shipment citing Houston Direct Navigaiton Company v. Insurance Company, 89 Texas, 1, and Railway v. Sherwood, 84 Texas, 133. There is no proposition clearly advanced in connection with this assignment; but it related to a charge that was refused, in effect that this was an interstate shipment and the parties could make any reasonable contract, except that the railway could not make a contract to exempt it from liability for its own negligence. We can not sustain this assignment, first, because the brief does not undertake to show the applicability of such charge; second, it would seem that no liability was claimed except for negligence of defendant; and third, the cases above mentioned upon which appellant relies are no longer the law on the subject with which they deal, having been in fact overruled by the later decisions. Railway v. Solan, 149 U. S., 133; Armstrong v. Railway, 92 Texas, 117.

The court instructed the jury correctly as to the measure of damages. We have carefully read the testimony with particular reference to the alleged excessiveness of the verdict, and conclude that it is not well taken.

The judgment is affirmed.

Affirmed.

FIFTH DISTRICT, 1901.

PARLIN & ORENDORFF CO. v. W. S. COFFEY, SHERIFF, ET AL.

Decided January 12, 1901.

1.—Claimant's Bond—Return of Property—Deterioration from Use.

A claimant of property seized under judicial process who has, under the statute, given bond stipulating that if he fails to establish his right to the property he will return it "in as good condition as when he received it," or pay its value, is not entitled to have excluded from consideration a deterioration in the condition and value of the property resulting from reasonable wear and tear incident to its careful use while in his possession, since the statutory requirement as to the condition is an absolute one.

2.—Same—Determining Condition of Property—Charge.

Where the court had properly submitted the issue whether the property, when tendered back, was in as good condition as when claimant received it, a requested charge as to determining the condition of the property, not called for by the evidence and which could only have served to confuse the jury, was properly refused.

3.—Same—Description of Property in Charge of Court.

Where, in an action to enjoin a judgment for the value of an engine on the ground that plaintiff, as a statutory claimant thereof, had duly tendered back the

property itself, and the pleadings and evidence, to which no objections were made, described the engine as consisting of a carriage, boiler, and other parts, it was not error for the charge of court, in submitting the issue as to the condition of the engine when tendered back, to describe it by a specification of such parts.

Error from Collin. Tried below before Hon. J. E. Dillard.

McCormick & Spence, for plaintiff in error.

G. R. Smith and *Abernathy & Beverly,* for defendants in error.

BOOKHOUT, ASSOCIATE JUSTICE.—Parlin & Orendorff Company filed its petition in the District Court of Collin County in January, 1898, against W. S. Coffey, sheriff of that county, and B. F. Houston, alleging, in substance, that on November 4, 1897, said B. F. Houston recovered a judgment against petitioner in a claimant's suit in which petitioner was claimant in the sum of $700, the value of an engine, with 10 per cent damages on said sum, and the judgment further found the value of the use of the engine while in the possession of the claimant to be $300. A copy of the judgment was made a part of the petition. No objection was made in the pleading to the judgment or its form. The petition alleged that within ten days after the judgment was rendered, and on the 13th day of November, 1897, the plaintiff tendered to said W. S. Coffey, sheriff, the property mentioned in said judgment (a traction engine) in as good condition as the same was in when plaintiff received it, and also tendered $370, with interest thereon, and costs in the suit in which said judgment was rendered. That the tender was refused by said sheriff. That an execution had issued on said judgment, and had been levied by the sheriff on certain of plaintiff's property, and he was about to sell same. Plaintiff prayed for an injunction pendente lite, to restrain said sale, and for a final judgment perpetuating same, and for costs and general relief. An injunction was ordered, and issued.

Defendant W. S. Coffey answered, March 24, 1898, admitting all the allegations of the petition, except as to the condition of the property tendered, denying that the property when tendered was in as good condition as when received; adopting, on information and belief, the allegations of the answer of his codefendant, alleging that he was not willing to receive the property unless his codefendant would first authorize him to do so, and disclaiming any interest in the suit.

Defendant Houston answered also, on March 24, 1898, admitting the allegations of the petition, except as to the condition of the property when tendered; pointing out defects alleged to have existed therein when tendered; also alleging that the money tendered had been conditionally tendered on the machinery being also taken, and alleging that he or his attorney had notified plaintiff that the money tendered would be received as a credit; that he had instructed the sheriff not to receive the engine; that the injunction was sued out for delay, and asking for

damages equal to 10 per cent of his judgment. There was a verdict and judgment for defendant, from which plaintiff appeals.

Appellant's first assignment of error complains of the action of the court in refusing the following special charge requested by it: "You are instructed that in determining the condition of the property when tendered to the sheriff, you will not consider reasonable wear and tear, incident to the careful use of the property by claimant after execution of the claim bond and before November 4, 1897, as deterioration in the value of the property." The court refused to give the above charge, and upon this phase of the case charged the jury as follows: "The jury are instructed that if they believe from all the evidence before them that the steam engine, carriage, boiler, etc., was in as good condition when plaintiff tendered same to defendants as it was when plaintiff received the same, then it will be the duty of the jury to find in favor of the plaintiff. On the other hand, if the jury should believe from the evidence that said property was not in as good condition as it was when plaintiff received it, your verdict should be for defendants on this the main issue in the case."

The contention of the appellant is, that if the property when tendered back was in as good condition, reasonable wear and tear thereof resulting from careful use of the same excepted, then it meets the requirements of the statute. The statute prescribes the conditions of a claimant's bond as follows: "That the party making such claim, in case he fails to establish his right to such property, shall return the same to the office making the levy, or his successor, in as good condition as he received it, and shall also pay the reasonable value of the use, hire, increase, and fruits thereof from the date of such bond, or, in case it fails to so return said property and pay for the use of the same, he shall pay the plaintiff the value of said property, with legal interest thereon from the date of the bond, and shall also pay all damages and costs that may be awarded against him."

There are two conditions set out in the bond. The claimant may discharge his obligation by the performance of either of these conditions. He may return the property to the officer making the levy, or his successor, in as good condition as he received it, and pay to the officer the reasonable value of the use of said property; or, if he fails to do this, then the statute requires him to pay to plaintiff the value of the property, with legal interest thereon from the date of said bond, and also all damages and costs that may be awarded against him. Rev. Stats., art. 5288. His right to discharge the judgment by return of the property within ten days, and upon paying the damages and the value of the use of the property and costs and damages, is an absolute right. Willis v. Chowning, 90 Texas, 617.

It is further held that the judgment should fix the value of the use of the property, so as to enable the claimant, if he should wish to return the property in satisfaction of the judgment, to know what amount he

is required to pay for its use. Publishing Co. v. Hitson, 80 Texas, 233. The statute, however, requires that the property, when tendered back, shall be in as good condition as when the claimant received it. This is the condition upon which the claimant is permitted to satisfy the judgment by return of the property. The condition is absolute. It does not admit of the construction sought to be placed upon it by the plaintiff in error. We conclude that the court did not err in refusing the charge requested, and appellant's first assignment of error is overruled.

Appellant's second assignment of error complains of the refusal by the court of the following special charge requested by it: "In determining the relative condition at different times of the steam traction engine, consideration should be had of the machine as a whole. Such a machine consists of a number of parts which, disconnected with each other, are property, but are not, until assembled and placed in proper relation to each other, an engine." There was no error in refusing the above charge. The court, in its general charge, had explicitly submitted to the jury the true issue in the case, that is, whether the property when tendered back was in as good condition as when claimant received it. The requested charge was not called for by the evidence, and could only have served to confuse the jury.

There was no error in refusing special charge number 3, requested by the plaintiff in error and made the ground of its third assignment of error. Hence we overrule the third assignment.

Appellant's fourth assignment of error reads: "The court erred in charging the jury concerning the condition of the steam engine, carriage, boiler, etc., because the only property claimed by the plaintiff, as shown by the claimant's bond and affidavit, was an *engine,* and the court, by including other articles in the charge, misled the jury, and imposed on plaintiff a liability greater than the law imposed, and a liability not supported by the pleadings or proof in the case."

The claimant's affidavit and bond described the property as "one Geiser engine, number 3881, engine Peerless." The petition in this suit describes the property as one engine. The answer speaks of the property as one engine, and sets up in detail the defects therein, which it was claimed showed that the same was not in as good condition as when received by the claimant. It was alleged that the boiler had been cracked, band wheel was gone, fire box was sprung, flue sheet sprung, steam gauge bursted, driver broken, part of traction wheel broken, etc. No objection was made to the pleading on the ground that the property was not sufficiently described, or that it was misdescribed. The evidence was admitted without objection which went to show that the engine was composed of different parts, that it had a carriage, boiler, steam engine, etc. The fact that the court, in charging the jury, described the property as steam engine, carriage, boiler, etc., in view of the record, could not have misled the jury. The parties have treated the carriage, boiler and steam gauge as parts of the engine. We conclude that there is no merit

in the fourth assignment, and the same is overruled. These remarks fairly dispose of appellant's fifth assignment of error, and the same is overruled.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

E. P. McMICKLE ET AL. v. W. C. HARDIN, MAYOR, ET AL.

Decided December 22, 1900.

1.—Injunction—Suits to Collect City Taxes—Legal Defenses Available.

Where a city has brought a number of suits against different parties to enforce against different pieces of property its lien for taxes, an injunction will not lie at the joint suit of such defendant owners to restrain the prosecution of the tax suits upon grounds that would be fully available as a legal defense therein.

2.—Municipal Incorporation—Validating Acts.

Where the attempt of a town council to accept the Act of 1875 and thereby become incorporated as a city of over 1000 inhabitants was insufficient in manner, and therefore illegal, as also its subsequent action in annexing additional territory, these things were validated by the Acts of 1891 and 1893 contained in article 386, Revised Statutes, and thereafter the right of the city to collect its taxes could not be defeated because of such irregularities.

Appeal from Bowie. Tried below before Hon. J. M. Talbot.

Robert R. Lockett and *Chas. S. Todd,* for appellants.

R. W. Rogers and *Wm. T. Hudgins,* for appellees.

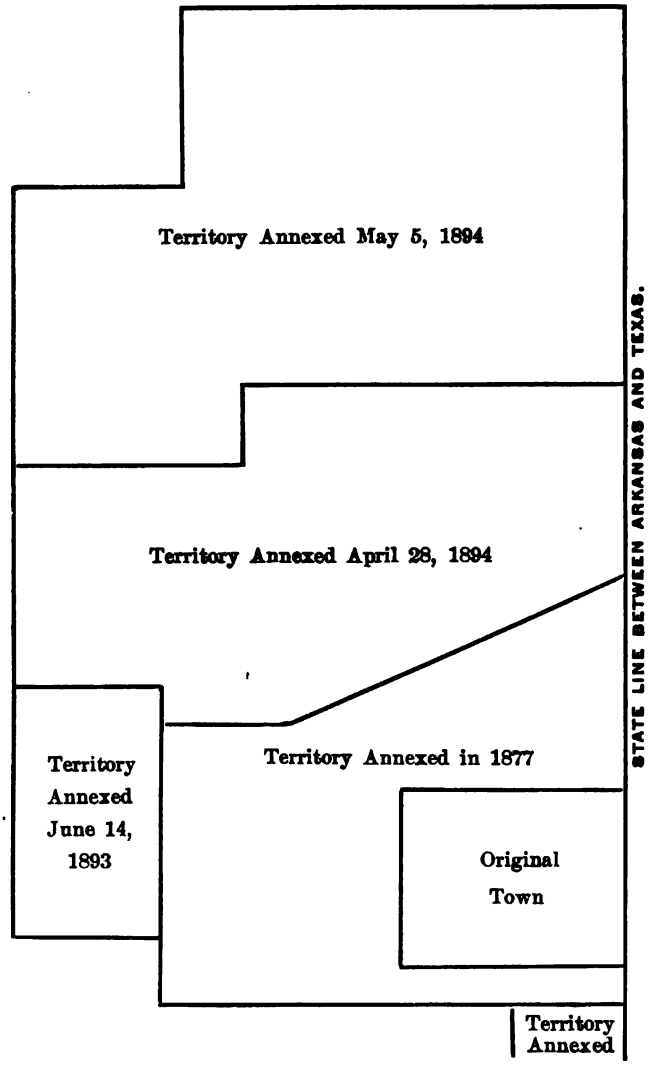
RAINEY, CHIEF JUSTICE.—This suit was instituted by E. P. McMickle, A. C. Allen, Richard P. Lumpkin, W. A. J. Smith, and Mrs. S. A. Smith, on the — day of March, 1900, praying for an injunction restraining the appellees, W. C. Hardin, mayor; W. E. Estes, assessor and collector of taxes; R. W. Rogers, city attorney, of the town of Texarkana, Texas, and the town of Texarkana, Texas, as a municipality, from the collection of city taxes alleged to have been unlawfully assessed and sought to be collected upon property of appellants, and to restrain appellees from the further prosecution of numerous suits filed by appellees in the District Court of Bowie County, Texas, seeking judgment for taxes against the property of appellants. A temporary restraining order was entered herein on the 3d day of March, 1900, by E. S. Chambers, district judge of the sixth judicial district, sitting in chambers at Bonham, Texas, and directing the clerk of the District Court of Bowie County, Texas, to issue the writs of injunction prayed for by appellants upon appellants giving bond in the sum of $500. Bond was given and writs were issued restraining appellees from further proceeding to the collection of taxes, or the prosecution of the suits therefor, till final hearing. On April 6, 1900, upon a full hearing of the

law and facts, both having been considered together, a judgment was rendered in the District Court of Bowie County, Texas, against appellants and in favor of appellees dissolving and vacating the restraining order theretofore made and dismissing the bill and taxing the costs against appellants.

Conclusions of Fact.—In 1874 the village of Texarkana, Texas, was duly and legally incorporated as a town under the laws then in force regulating the incorporation of towns, and said town corporation was duly administered until January 3, 1877, when the town council, at a regular meeting by a unanimous vote passed an ordinance containing, among other things, the following: "We, W. B. Russell, mayor; R. W. Rodgers, J. M. Benefield, W. H. Elliott, J. A. Cambell, and Geo. W. Snell, aldermen of the above mentioned town and city, incorporated under general laws passed January 12, 1858, regulating the incorporation of towns, on the 12th day of June, 1874, do hereby unanimously adopt, accept, and reorganize under and by virtue of the act of the general laws, passed March 15, 1875, regulating the incorporation of cities of one thousand inhabitants and over, not in conflict with the Constitution of the State of Texas, adopted November 23, 1875." At that time the town of Texarkana contained more than 1000 inhabitants. The ordinance then passed, was filed and recorded in the county clerk's office of Bowie County, Texas. At the same meeting and after the adoption of the aforesaid ordinance, said council proceeded to business by acting on a petition of citizens for the extension of the city limits, which was granted. Said petition was signed by a majority of the voters of the territory sought to be annexed. Other territory was annexed in the years 1893 and 1894. The proceedings to annex said territory were in conformity to the then existing laws relating thereto.

The following map shows the original town and the territory annexed and time of annexation. Appellants reside in territory annexed in 1894, and which is not adjacent or contiguous to the territory originally incorporated, being separated therefrom by the territory annexed in 1877. That the seven suits mentioned in plaintiff's petition were instituted and are pending in the District Court of Bowie County, Texas, to enforce tax liens, and about fifty other similar suits for delinquent taxes against other parties are also pending, as alleged in plaintiffs' petition. That the questions of law as to the legality of said taxes are the same, and are common to each and all of said seven suits. But the other suits are for taxes on property situated in different portions of Texarkana, in its original limits, and in other portions of the city. But no question is made as in this case, or answer filed contesting the validity of the tax liens sought to be enforced. That since January 3, 1877, said corporation has acted and been generally recognized by the State and the public as a city of more than 1000 and less than 10,000 inhabitants. That plaintiffs have voted for officers of said city at elections regularly and repeatedly held in all the wards including wards 5

and 6. That said Texarkana, Texas, as a city, has issued and floated its bonds in the sum of $77,000, of which $43,000 are now outstanding in the hands of purchasers for value. That on the 19th day of October, 1898, in cause No. 4177, wherein the city of Texarkana was plaintiff



and Chas. R. Korn was sole defendant, pending in the District Court of Bowie County, Texas, in which suit the legality of the action of the board of aldermen of the town of Texarkana, Texas, in accepting and adopting the provisions of the Act of March 15, 1875, to be incorporated as a city of 1000 inhabitants or over, and the annexation of the terri-

tory adjoining the limits of said town as shown by the minutes of the board of aldermen of said town, which are attached to and made part of the defandants' answer wherein was duly pleaded and at issue, the said court, by its final decree rendered in said cause, did duly adjudicate and determine both of said questions in favor of said city of Texarkana, and adjudge such annexed territory to be an integral part of and within the corporate limits of said city of Texarkana, and the property therein situated subject to taxation by said city.

Conclusions of Law.—1. We are of the opinion that plaintiffs were not entitled to the writ of injunction to restrain the proceedings in the suits already instituted against them by the defendant herein. We are aware that our Supreme Court has held that a number of inhabitants of a municipality may join in an action to enjoin the officers thereof from the collection of an illegal tax. In those cases, however, the injunction proceedings were brought before there were any suits instituted in the courts to enforce collection. In Gibson v. Moore, 22 Texas, 611, Wheeler, Chief Justice, broadly states the principle, "that matter which will constitute a defence of which a party may avail himself in a suit pending against him can not be made the ground of an injunction to restrain proceedings in such suit."

In Sumner v. Crawford, 91 Texas, 129, Justice Denman, in discussing the rule in equity that an injunction will not lie where the plaintiff has an adequate remedy at law, quotes with approval as follows: "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity," citing Watson v. Sutherland, 5 Wall., 74; North v. Peters, 138 U. S., 271. The plaintiffs could have plead the matters here urged for relief in the suits then pending against them, and such relief as they are entitled to would be administered as practically and efficiently as in this proceeding. In said case it is further held that under our statute the right to the writ is not limited absolutely to the rules of equity, but should be issued when, in order to give the relief to which the party is entitled, the restraint of some act is necessary.

The plaintiffs having the right to interpose the matters here urged for relief as a defense in the suits pending, it was not necessary for their relief that this proceeding should be instituted. The ground urged in support of the right to bring this suit, that it will prevent a multiplicity of suits, is not sufficient under the facts to take this case out of the rule laid down in Gibson v. Moore, supra.

2. The attempt of the town council to accept the provisions of the Act of 1875 and thereby become a city was of no effect. Harness v. State, 76 Texas, 566, and authorities there cited. However, we think such attempt was validated by acts of the legislature in 1891 and 1895. See Rev. Stats., art. 386. The Legislature had the authority to author-

ize chartered towns to accept the provisions of law relating to cities and thereby become chartered cities. Having such authority, it follows that the validating acts apply to this case, the provisions thereof being sufficiently comprehensive to embrace the attempt to incorporate as a city. Said acts of the Legislature not only validated the attempt to incorporate as a city, but also acts done by the council that could have been legally done had such attempt been in accord with the then existing law. The annexing of the territory being in accord with the provisions of the law relating to cities, such annexation also becomes validated by said acts of the Legislature.

The city of Texarkana has the right to enforce the collection of the taxes, and the judgment is affirmed.

Affirmed.

JULES SCHNEIDER ET AL. v. LEONARD SELLERS ET AL.

Decided December 8, 1900.

1.—Judgment—Collateral Attack—Trespass to Try Title.

Where, in a suit of trespass to try title, the plaintiffs sought, on the ground of fraud, to set aside certain partition judgments affecting their title to the land, and all parties to such judgments were made parties to the suit, as also subsequent purchasers of the land claiming under the partition and the court in which the suit was brought had rendered the partition judgments and had jurisdiction to set them aside, the attack so made on the judgments was a direct and not a collateral one, and the action such a one as plaintiffs were entitled to maintain.

2.—Same—Fraud—Minor Heirs.

Plaintiffs, suing to set aside a judgment of partition between themselves, as minor heirs of their deceased father, and their mother, alleged that the property partitioned was the separate estate of their father; that after their father's death their mother married again, and that they were in the care, custody and control of their stepfather at the time the partition judgment was rendered; that both their mother and stepfather knew that the land was separate and not community property, and fraudulently withheld the facts from the court; and that those of the defendants now claiming under the judgment as purchasers had notice of the fraud. Held, that the allegations stated sufficient grounds for vacating the judgment as to all the defendants.

3.—Plea of Privilege—Fraudulent Conversion—Venue.

Plaintiffs sued in the county where the land lay for recovery thereof, with an alternative plea in tort for damages for a fraudulent conversion of the land by certain of the defendants, residing in another county, who, as against such claim for damages, pleaded their right to be sued in the county of their residence, but did not negative the fact that the conversion, or fraudulent sale of the land by them, was made in the county where suit was brought. Held, that the plea of privilege was properly overruled.

4.—Misjoinder of Actions—Alternative Plea.

That plaintiff in trespass to try title pleads in the alternative for damages for a fraudulent conversion of the land by defendant in selling it to another, does not constitute a misjoinder of actions.

5.—Mortgage of Wife's Separate Property to Secure Community Debt.

Where the wife joins with the husband in a mortgage of community property and of her separate estate to secure a debt of his, or of the community, she is entitled to have the community property first exhausted before resort can be had to her separate property; and in such a case parties claiming the separate

property through a conveyance from the wife have ground for relief against the mortgage incumbrance where the creditors secured by it permit the community property to be squandered by the husband's other creditors and otherwise, though notified to foreclose.

6.—Presumption of Community Property—Innocent Purchaser.

The presumption of law is that land deeded to a husband after marriage is community property, and one who purchases it on the faith of that presumption, and without notice that it is in fact separate property, is entitled to protection.

7.—Failure of Consideration—Mortgage—Surety.

Where, as part consideration for a mortgage, the mortgagees agreed to advance to the mortgagor $1000 to be used by him in trading, and did advance $500 thereof, but were never called on by him for the balance, his wife, a party to the mortgage because her separate property was included therein as security for his debt, had no ground for avoiding the instrument because of failure of consideration.

8.—Notice to Mortgagee to Foreclose—Wife's Property as Security.

It seems that where, in a joint mortgage by husband and wife, the wife's separate property, as security for the husband's debt, is included along with community property a notice by the husband alone to the mortgagee creditor, requiring him to foreclose his lien, but making no mention in the notice of the interest of the wife, is sufficient to require the creditor to first exhaust the community property before he can resort to the separate property of the wife.

9.—Subrogation—Paying Off Prior Lien.

Where parties purchasing land under a foreclosure of their mortgage lien thereon, in order to protect their title pay off another lien on the land superior to their own, they are not mere volunteers in making such payment, and are entitled to be subrogated to the rights of the holder of the lien so discharged.

Appeal from Ellis. Tried below before Hon. J. E. Dillard.

Templeton & Harding and *W. P. Ellison* for appellants.

Sims & Snodgrass, for appellees.

RAINEY, CHIEF JUSTICE.—This suit was instituted by plaintiffs against W. C. Walker and wife, Sarah E. Walker, Jules Schneider, Alfred Davis, and the Schneider-Davis Company, a private corporation. The object of the suit is to recover a certain tract of land situated in Ellis County, which it is claimed plaintiffs inherited from their father, Teole Sellers; and a direct attack is made upon two judgments of the District Court of Ellis County partitioning the estate of Teole Sellers between plaintiffs and Sarah E. Walker, the surviving widow of said Teole Sellers, who, after the death of said Sellers, intermarried with said W. C. Walker. Various grounds are urged why said judgments should be held void.

It was alleged that Schneider & Davis had bought the land set apart to Mrs. Walker under a sale by virtue of a deed of trust executed to them by Walker and wife, and that same had been deeded by Schneider & Davis to said Schneider-Davis Company, in fraud of plaintiffs' rights, and plaintiffs pray for damages, etc.

Defendants, Schneider and Davis and the Schneider-Davis Company, plead a general demurrer, a number of special exceptions, general denial,

the five years statute of limitation, and that they were innocent purchasers, etc., and also the payment by them of a certain incumbrance on the land given by Walker and wife to the guardians of plaintiffs.

In reply to said answer plaintiffs plead their minority and the coverture of Mrs. Walker, denying that Schneider & Davis and said company were innocent purchasers. That the deed of trust given by W. C. Walker and Sarah E. Walker to Schneider and Davis included certain personal property which was of value more than sufficient to pay off and discharge the debt secured, and that by their gross negligence they permitted said personal property to be squandered and lost, by which the lien upon the land was released, it being the separate property of Mrs. Walker, and stood only as surety, and that the sale of the land under the trust deed was, as to Mrs. Walker, void and of no force, the same having been bid in by said Schneider & Davis. That the sale to Schneider-Davis Company was fictitious and fraudulent. It was further alleged that W. C. and S. E. Walker had conveyed said land to plaintiffs, and assigned to them all claims for damages against said Schneider & Davis growing out of said transaction.

In reply to this last supplemental petition of plaintiffs, defendants plead a general exception, several special exceptions, the statute of two years limitation to the claim for damages, general denial and various special answers. Special issues were submitted to the jury, and upon the findings a judgment for the land was entered for plaintiffs.

Appellants, by exceptions to plaintiffs' petition, which the court overruled, and which action of the court is here complained of, questioned the right of plaintiffs to prosecute in this suit an action for the recovery of the land and to set aside, for fraud, certain judgments affecting the title to said land; the contention being that as third parties have become possessed of said land, such an attack upon the judgments is collateral, although made in the court rendering same, and further, that a suit attacking a judgment for fraud can only be maintained against the parties to the judgment, or at least to the fraud.

We are of the opinion that the court properly overruled defendants' exceptions in this particular. It is true that the main object of the suit is a recovery of the land in controversy, but before a recovery could be had, it was essential that the judgments should be set aside, for if they stand plaintiffs can not recover as heirs of their father. A direct attack is made upon the judgments in this suit. All the parties to said judgments are made parties to this proceeding, and as Schneider & Davis and the Schneider-Davis Company claim through said judgments, it was proper to litigate their validity in this proceeding, and such an attack can not be held to be collateral. Heidenheimer v. Loring, 6 Texas Civ. App., 560.

In the case of Crawford v. McDonald, 88 Texas, 626, Justice Denman clearly makes the distinction between a direct and collateral attack upon a judgment. He says a direct attack "is an attempt to amend, correct, reform, vacate, or enjoin the execution of same, in a proceeding

instituted for that purpose, such as a motion for a rehearing, an appeal, some form of writ of error, a bill of review, injunction to restrain its execution, etc." A collateral attack "is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid, as where, in an action of debt on a judgment, defendant attempts to deny the fact of indebtedness; or where, in a suit to try title to property, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effects, etc."

This action partakes of a dual character. While the main object is to recover the land, it at the same times makes a direct attack to vacate the judgment through which Schneider & Davis and the Schneider-Davis Company claim the land as innocent purchasers. In order to affect defendants' claim to the land, it was necessary to make them parties to the action to vacate said judgments. This being so, we see no good reason under our system of practice why in the same action the title to the land and the validity of the judgments should not be adjudicated, all those interested being parties to the suit, and the judgments having been rendered by the tribunal in which the suit is instituted and having full and complete jurisdiction of all the matters sought to be adjudicated. Had plaintiffs brought an action of trespass to try title and not made an attack upon the judgments, then they could not show the invalidity of the judgments, unless they appeared to be void on their face.

The court overruled defendants' exception to plaintiffs' petition which assailed the petition on the ground that it did not show sufficient facts to avoid said judgments. It alleges, in substance, that plaintiffs were the children of Teole Sellers and S. E. Sellers; that after the death of Teole Sellers, S. E. Sellers married W. C. Walker; that plaintiffs were minors, and in the care, custody, and control of said S. E. Walker and husband, W. C. Walker, at the time of the rendition of said judgments; that said Walkers knew that said land was the separate property of said Teole Sellers, and was not the community property of said Sellers and the said S. E. Walker, and that they, the said Walkers, fraudulently withheld the facts from the court, etc.

Notice of the fraud on the part of Schneider & Davis is also alleged. We are of opinion that, owing to the relation existing between the plaintiffs and the Walkers, it was incumbent on them to at least not take advantage of the plaintiffs' condition, and the allegations stated sufficient grounds for vacating the judgments as to the Walkers, and also as to Schneider & Davis, it being alleged that they had notice of the fraud.

The plaintiffs by amended petition set up in addition to their claim to the land as heirs of Teole Sellers a claim to the land by conveyance to them from S. E. Walker, and also charged that Schneider & Davis had fraudulently converted the land by selling same, and prayed in the alternative for the value of the land, if the land itself could not be recovered. The defendants, Schneider & Davis, and Schneider-Davis Company, plead their residence in Dallas County, that the alternative

plea for damages sought to recover for a tort, and that they were entitled to be sued in the county of their residence. The plea of privilege was overruled, and is here assigned as error. The land in controversy is situated in Ellis County, where the suit was brought, and in order for said plea to prevail, it should have negatived the fact that the conversion, or rather the sale of the land, was made in said county. This it does not do. Boothe v. Feist, 80 Texas, 141.

We do not consider that there is any merit in defendants' exception that the plea for damages in the alternative in this suit was not permissible, as it would constitute a misjoinder of actions.

The court overruled defendants' exception to that portion of plaintiffs' petition which alleges the sale of the land under the trust deed to be void in that the land was a mere security, and Schneider & Davis were bound to exhaust the personal property in the payment of their debt before resorting to the land for that purpose, said personal property being community property; that said Schneider & Davis had permitted said personal property to be squandered by the creditors of W. C. Walker and otherwise, though they had been notified to foreclose upon said personal property but failed to do so, and that by reason of such failure said property had been squandered and said Schneider & Davis, by their wrongful and fraudulent acts in refusing and failing, though requested, to realize upon same, released said land of said S. E. Walker, which stood in relation of surety for the debt; that said Walker, joined by her husband, had conveyed said land to plaintiffs, and at the same time assigned to plaintiffs all her right of action for damages, etc., arising from the sale and appropriation of said land by said Schneider & Davis under said deed of trust, etc.

The ground for exception was, in substance, that said property, being community property, was taken to pay community debts, and S. E. Walker would not be heard to complain if said property was so appropriated. Where the husband and wife execute a deed of trust conveying community property and also separate property of the wife to secure the debt of the husband, the wife is entitled to have the community property first exhausted before resort to her separate property is had to pay such debt. James v. Jacques, 26 Texas, 320. The allegations charge such laches on the part of Schneider & Davis as, if true, constitute cause for relief. The exception was properly overruled.

There are various other assignments which we deem unnecessary to discuss in detail, but the material questions raised will be treated under the assignment that the judgment is contrary to the law and evidence.

The evidence shows that the plaintiffs were the children of Teole Sellers and wife S. E. Sellers, who, after Teole Sellers' death, married W. C. Walker, and that the land in controversy was the separate property of Teole Sellers. This being so, plaintiffs inherited said land, subject, of course, to the surviving spouse's interest under the law, which it is unnecessary to notice here. After the death of Teole Sellers and after the marriage of the surviving wife to W. C. Walker, suit was brought in the

District Court of Ellis County in behalf of these plaintiffs by Wade H. House, as next friend, against S. E. Walker and her husband, W. C. Walker, in which the court determined that the land in controversy was a part of the community property of Teole Sellers and his wife. But as a part of said land, to wit, 200 acres, constituted the homestead, no partition was made of this 200 acres. Subsequently Bascom McDaniel, who was appointed guardian of these plaintiffs, brought suit as such in said District County against said S. E. Walker and her husband, seeking a partition of said 200 acres between plaintiffs and said Walkers. The court entered judgment upon an agreement between said guardian and the attorneys of said Walkers by which the land in controversy, 100 acres, was set apart to said S. E. Walker, and the other 100 acres was set apart to plaintiffs.

Appellees insist that these judgments are void for various reasons which appear from the record thereof, and that same do not support Schneider & Davis' claim of innocent purchasers. The judgments were rendered by a court of competent jurisdiction in suits brought by parties who were authorized by law to represent the minors, and there is nothing appearing from the face of the record to put Schneider & Davis upon notice of any fraud. There is no evidence to show that they had notice of any fraud in the procurement of same, and the jury found that at the time they took the deed of trust they did not have notice of any fraud. The deed to the land was made to Teole Sellers after his marriage, and the presumption of law is that it was community property. Besides, the first judgment of the District Court of Ellis County adjudged it to be community property of said Sellers and wife. Schneider & Davis not having notice of fraud, or of any fact to put them on notice, we hold that they are protected in their purchase of the land under said trust deed, and entitled to recover unless, by their conduct subsequent to the execution of the deed of trust and prior to the sale thereunder, their lien on said land was released. The evidence was sufficient to warrant the court in vacating said judgments as to the Walkers, but as the fraud in procuring the same appears from evidence dehors the record, Schneider & Davis are not affected thereby, they not having notice of the fraud.

It is also urged by appellees that there was a failure of consideration for the execution of the deed of trust, in that Schneider & Davis, in order to get a pre-existing debt due them by W. C. Walker secured, agreed to advance said Walker $1000 with which to buy cattle, and that upon the faith of said agreement S. E. Walker was induced to execute said deed of trust, but that Schneider & Davis failed to advance said sum as agreed upon.

It does appear from the evidence that the agreement was made as stated, but as to the amount advanced there is some conflict in the evidence. The jury found that $500 was advanced, and this, we think, is supported by the evidence. We also think the evidence shows that

Schneider & Davis were ready to advance the balance for the purpose of buying cattle as per the agreement, but that a trade W. C. Walker had pending for the purchase of cattle fell through, and he could not use the balance for that purpose. At least the evidence fails to show any demand on Schneider & Davis for said balance to be used for that purpose, or that said Schneider & Davis ever refused to advance said balance for the purpose stated in the agreement. Under the facts we are of the opinion that a consideration passed, and that S. E. Walker is in no condition to complain, for it does not appear to be the fault of Schneider & Davis that W. C. Walker did not see proper to or could not invest the balance in cattle.

We will now consider the proposition that the evidence fails to show that Schneider & Davis, by their conduct and laches in dealing with the personal property, released the lien upon the land. It appears from the evidence that some time after the execution of the deed of trust, and after the maturity of the debt it was given to secure, Walker's creditors were levying executions on the personal property covered by the deed of trust to pay the community debts of Walker and wife. W. C. Walker notified Schneider & Davis in writing that said property was being thus disposed of, and urged a foreclosure of their lien. It is stated by Walker that this notice was to protect his wife's land, though this object was not stated in the notice to Schneider & Davis, and it was shown that the personal property was of sufficient value to have paid off the debt due Schneider & Davis. They took no action in the premises, and the most of said property was finally appropriated by other creditors. It is contended by appellee that Schneider & Davis' conduct in the respect stated had the effect to release the land from the lien, and that the sale of same under the trust deed was of no force. It is insisted on the other hand that the notice given by Walker was not sufficient to inform Schneider & Davis that it was intended for the protection of Mrs. Walker, and that, if so, it was ineffectual, as she could not legally require Schneider & Davis to act, but if she desired protection the law required her to pay off the debt and then proceed against the personal property to reimburse herself.

Under the authority of James v. Jaques, supra, we are of the opinion that Mrs. Walker had the right, under the circumstances, to require Schneider & Davis to first exhaust the personal property before resorting to the land to pay the debt, but the question arises as to the sufficiency of the notice given by Walker to require any action upon the part of Schneider & Davis to make their debt out of the personal property.

In a case decided by the Court of Appeals of Kentucky (Medley v. Tandy, 4 Southwestern Reporter, 308), it was held that a notice given by the husband to the creditor to bring suit was sufficient to require the creditor to act, though the interest of the wife was not mentioned. If it be conceded that notice given by the husband alone, and the interest of the wife not being mentioned therein, is sufficient to require the credi-

tor to first exhaust the community property mortgaged before resort can be had to the separate property of the wife which is included in the same mortgage, yet we are of the opinion that the notice given by W. C. Walker in this case did not impose any duty upon Schneider & Davis in the premises. It appears from the evidence that, prior to the giving of said notice, said personal property had been released from the trust deed by an agreement between Schneider & Davis and W. C. Walker and another mortgage executed thereon by W. C. Walker in favor of said Schneider and Davis; hence the notice given by Walker did not relate to a foreclosure of the trust deed on said personal property, but could have had reference only to a foreclosure of the subsequent mortgage executed by Walker.

The evidence of witness Ellison relating to the execution of the subsequent mortgage by Walker is as follows: "The cattle that I sold to Walker after he sold them to me were taken by me in the first place as a credit on the $2831.26 that he owed Schneider & Davis, and he owed them that amount of money, less $500 secured by a mortgage on the cattle and a second mortgage on the land. The object was to get them out from under a heavy mortgage; they were in one big mortgage, and the object was to take them out from under that and put them in a separate mortgage to themselves. I took them from him by a bill of sale and immediately sold them back to him and reserved a lien on them. I don't know whether I got $1000 worth of cattle or not, because I took them on the range. I agreed to take them at $1000, and sell them back to him at that price, thereby shifting the security and relieve the land to that extent, and also made the security on the cattle so that he could handle them."

It is insisted by appellees that the effect of this transaction was to release the land from the trust deed. While the evidence shows that the personal property was released from the original trust deed by said transaction, there is no plea by plaintiffs relying upon said transaction as a release of the land as surety; hence, if it should be conceded that said land was released by reason thereof, there is no pleading upon which a verdict or judgment could be based. No issues were submitted to the jury relating to this transaction, and we do not deem it proper to determine whether or not the effect of same was to release the land as security for the debt.

Appellants complain of the failure of the court in not subrogating them to the lien on the land given by W. C. and S. E. Walker to Bascom McDaniel, guardian of plaintiffs, and in not rendering judgment for the amount of the notes paid by them and foreclosing the lien securing same. After Schneider & Davis purchased the land under the trust deed, they paid the McDaniel notes secured by the lien on the land. It appears that said lien was superior to theirs, and after their purchase of the land they paid said claim to protect their title, believing it was necessary to do so. Under these circumstances Schneider & Davis should not

be considered volunteers in paying off said claim, but were entitled to be subrogated to the rights of the holders of said notes and lien. Davis v. Farwell, 49 S. W. Rep., 656.

The judgment is reversed and cause remanded.

Reversed and remanded.

Application for writ of error dismissed by the Supreme Court for want of jurisdiction.

J. L. JONES ET AL. v. MEYER BROS. DRUG COMPANY ET AL.

Delivered January 12, 1901.

1.—Allegation and Proof—Variance—Description of Judgment.

Where plaintiff's claim of title to the property in controversy was by virtue of a judgment and execution sale thereunder, and his petition alleged that the judgment was rendered in the district court, but the judgment introduced in evidence was rendered in the county court, an objection on the ground of variance came too late after verdict.

2.—Execution Against Interest of Partner—Return—Presumption.

Where the return on an execution against the interest of a partner in firm property shows a levy, but not the manner in which it was made, the presumption of law is that the officer did his duty and made the levy as the statute directs (Revised Statutes, article 2352); and where the legality of the levy is not raised by the pleading, the return can not be attacked collaterally.

3.—Same—Omission in Return.

The omission of certain fixtures from the description of the property levied on does not affect the validity of the levy as to the other property seized.

4.—Pleading by Trustee in Bankruptcy—Admission—Intervention.

Where a plea of intervention by a trustee in bankruptcy failed to allege that the bankrupt had been adjudged such, the defect was obviated by an averment of such matter in defendant's answer although a demurrer by plaintiff (appellee) to that allegation of the answer had been sustained.

5.—Same—Allegation of Appointment as Trustee.

An allegation by a trustee in bankruptcy that he was duly appointed trustee by the referee is equivalent to a declaration that the circumstances existed which empowered the referee to make the appointment.

6.—Trustee in Bankruptcy—Leave of Court.

An objection that a trustee in bankruptcy had no right to intervene in the suit without showing that he had obtained leave to do so from the bankruptcy court, comes too late where first made after verdict.

7.—Same—Proof of Appointment and Qualification.

Where a trustee in bankruptcy intervenes in a suit, he is not required to prove his appointment and qualification as such trustee where his right to recover in that capacity is not denied under oath, under Revised Statutes, article 1265.

8.—Partner's Interest Sold Under Execution—Purchaser's Right of Recovery.

Where a partner's interest in a mercantile business was levied on and sold under execution, but the firm continued for some months thereafter to carry on the business at a profit, selling the old goods and replenishing with new from the proceeds, the execution purchaser, suing for the debtor partner's interest, was not limited to the goods bought by him which were actually in stock at time of the trial, but was entitled to compensation for the property disposed of, as for a conversion.

9.—Same—Extent of Recovery Determined by Agreement.

Since the intervening trustee in bankruptcy was entitled to recover all the property sued for except the part which plaintiff, the execution purchaser, was entitled to, and since intervenor and plaintiff had agreed upon a division of the recovery satisfactory to themselves, it was not a tenable objection on the part of the defendants that plaintiff's proof failed to show the extent of plaintiff's interest and the value of the goods converted.

10.—Same—Legal Title Placed in Another.

Where S. had loaned to D. the money to buy the interest in the stock, and the purchase was made for D., although the title was taken in the name of S. for the purpose of protecting the property from D.'s creditors, the property belonged to D., and was subject to the levy of an execution against him.

11.—Same—Evidence—Fraud and Collusion.

Evidence as to the financial condition of S., both before and after the purchase for D. of an interest in the business, and statements by S. in relation thereto, were admissible to prove whether he or D. was the real purchaser.

12.—Same.

So, evidence of D.'s prior failure in business and insolvency was admissible as tending to show a reason for his making the purchase in the name of another, and evidence that, though insolvent, he had some money, tended to prove ability on his part to make the purchase.

13.—Same—Conspiracy.

Statements by D. as to an attempted purchase of a stock of goods by him were admissible, though made when S. was not present, the jury being instructed that they could not consider the same unless they found them to have been made in pursuance of an agreement btween D. and S. by which D. was authorized to use the name of S. to cover up property he might buy.

14.—Receiver—Appointment—Action Against One Partner.

After verdict and pending an appeal in an action to subject the interest of a partner in firm property to his debts,—he being insolvent, in possession and management of the property, but likely to misappropriate it,—the court may, under Revised Statutes, article 1465, appoint a receiver to carry out the provisions of the judgment directing a sale of the property, although the other partner is solvent and able to respond in damages, should he waste or misappropriate the property pending the appeal.

15.—Same—Case Distinguished.

This case distinguished from Bank v. Dunham, 18 Texas Civil Appeals, 184, upon the point as to when the appointment of a receiver is authorized.

Appeal from Grayson. Tried below before Hon. Don A. Bliss.

Barrett, Simmons & Freeman and *Galloway & Templeton,* for appellants.

A. H. Culver, Moseley & Smith, and *T. B. Eppstein,* for appellees.

TEMPLETON, ASSOCIATE JUSTICE.—Appellant Jones and one Howard were partners in the retail drug business at Denison, Texas. In June, 1895, Howard sold his interest in the business, ostensibly to appellant Simmons, but the appellees contend that the appellant De Gaugh was the real purchaser. The business was thereafter conducted in the name of Jones & Simmons. De Gaugh had been engaged in the drug business at Austin, Texas, and had become indebted to the Meyer Bros. Drug Company. He failed in business, and the drug company reduced

its claim against him to judgment. Execution was issued on the judgment, and on April 11, 1896, was levied on De Gaugh's interest in the business, run in the name of Jones & Simmons. There was a sale under the levy on May 5, 1896, and the drug company became the purchaser at the sale and received a bill of sale from the sheriff. On December 21, 1898, the drug company brought this suit against Jones, Simmons, and De Gaugh, alleging the facts above stated, and further, that De Gaugh was, at the time of the levy, the owner of an undivided one-half interest in the said business by virtue of the purchase from Howard, it being charged that the purchase was made in the name of Simmons for the purpose of covering up De Gaugh's property and preventing its seizure by his creditors. Burton Richards intervened in the suit, and alleged that he was trustee in bankruptcy for the creditors of De Gaugh, and that De Gaugh had an interest in the said business which he, as trustee, was entitled to recover. There was a trial by jury which resulted in a judgment in favor of plaintiff and intervener for the recovery of an undivided one-half interest in all the property owned by the firm of Jones & Simmons. Thereupon a receiver was appointed, who qualified and took charge of the business. Jones, Simmons, and De Gaugh have appealed from said judgment, and from the order appointing the receiver.

It was alleged by the drug company that the judgment under which it claims was rendered in the District Court of Travis County, but the judgment introduced in evidence was rendered in the County Court of said county. It is insisted that the variance is fatal, and constitutes fundamental error. We are of the opinion that the objection should have been made when the judgment was offered, and that, as this was not done, it can not be urged, for the first time, after verdict. The plaintiff claimed title to the property sued for by virtue of a judgment and execution sale thereunder against De Gaugh. The misdescription of the court in which the judgment was rendered was obviously a clerical mistake which might have been corrected by trial amendment, had the objection been made at the proper time. It is not shown that appellants were misled or injured by reason of the mistake, or that the granting of a new trial would place them in any better position so far as this issue is concerned. If appellants desired to take advantage of the mistake of the pleader, they should have interposed their objection on the trial, and not having done so, can not now complain.

It is contended that the sheriff's return on the execution is insufficient, for the reason that the manner in which the levy was made is not shown. Article 2352, Revised Statutes, provides how a levy on partnership property shall be made, and in Middlebrook v. Zapp, 79 Texas, 323, it was held that the statute must be followed by the officer in making the levy. But the statute does not prescribe any form of return, and does not provide that the return shall show the manner in which the levy was made. The return will be liberally construed, and the presumption that the officer did his duty will be indulged. Miller v. Alex-

ander, 13 Texas, 503; Murfree on Sheriffs, sec. 839a. In this case the return shows that the writ was levied, and the presumption is that it was levied in the manner prescribed by law. The legality of the levy was not raised by the pleadings, and the return can not be attacked collaterally. Flanniken v. Neal, 67 Texas, 629. The title of the purchaser at execution sale does not depend on the return, and any informality or irregularity therein will not affect his title. Fitch v. Boyce, 51 Texas, 344.

There was appended to the return a notice of the levy, directed to Jones & Simmons, and signed by the sheriff. This notice is, presumably, a copy of the notice of the levy left by the sheriff with Jones, but it is not referred to in the return, or shown by extrinsic evidence to be such copy. It was not offered in evidence by the plaintiff, but was introduced by the defendants. As the return showed a valid levy, the plaintiff was not bound to produce the notice, and the introduction of it by the defendants would not invalidate the levy, unless it showed that the levy was not made as required by law. The notice was, in form, in substantial compliance with the statute, but, in describing the attached property, omitted the fixtures which were shown by the return to have been levied on. Even if the notice is considered as a part of the return, and as controlling in the matter of description, the levy would still be good as to the property seized other than the fixtures. The levy and sale thereunder were sufficient to convey to the drug company the title of De Gaugh in and to any of the stock of merchandise held in the name of Jones & Simmons at the time of the levy, and the court did not err in so instructing the jury.

The right of the intervener to judgment is questioned on the ground that his petition and proof are insufficient to show that he, as trustee, had any title to, or right to the possession of, the property sued for. It was alleged by the intervener that he was, by F. B. Dillard, referee in bankruptcy for the Eastern District of Texas, duly appointed trustee for the creditors in the matter of J. A. De Gaugh, bankrupt, pending in the United States District Court for said district; that he accepted the appointment and was duly qualified, and by virtue thereof became entitled to the possession of all the property of the said De Gaugh, not exempt from forced sale, for the purpose of holding the same subject to the demands of the creditors and the orders of said court. No exception to the petition was urged before trial, but it is insisted now that the petition is defective for the reason that it was not alleged that De Gaugh had been adjudged a bankrupt, and that the intervener was appointed trustee by the court or elected by the creditors, and that he had obtained leave of the bankruptcy court to intervene in this suit. The first ground of objection, conceding it to be well taken, is obviated by the answer of the defendants wherein it was alleged that De Gaugh had been adjudged a bankrupt. It is true that the plaintiff demurred to that paragraph of the answer, and that the demurrer was sustained, but that fact did not affect the plea as an answer to intervener's case. The

objection that the trustee was not appointed by the court or elected by the creditors is not well taken. It is provided by section 44 of the bankrupt act of 1898, that the creditors shall appoint a trustee. Section 2 provides that a court of bankruptcy may appoint a trustee upon the recommendation of the creditors, or when the creditors neglect to act. Section 38 provides that the referee shall have the authority of a bankruptcy court, except concerning applications for compositions and discharges, when such authority is not denied by other provisions of the act, and there is no provision which prohibits the appointment by him of a trustee. It follows, therefore, that under certain circumstances the referee may appoint a trustee, and the allegation that the intervener had been duly appointed trustee by the referee is equivalent to a declaration that the circumstances existed which empowered the referee to make the appointment. We think that the trustee had a right to intervene in this suit without obtaining leave to do so from the bankruptcy court, but in any event the objection should have been made before trial.

On the trial the intervener did not prove his appointment and qualification as trustee, and it is contended by the appellants that his failure to do so is fatal to his right to recover. The intervener's suit was brought in his capacity as trustee and his right to recover in that capacity was not denied under oath. We are of opinion that article 1265, Revised Statutes, applies to this case, and that it was not necessary for the intervener to prove his appointment and qualification as trustee. Under the old bankrupt law, where the title to the property of the bankrupt was vested in the assignee by virtue of a transfer from the register in bankruptcy, it may have been necessary for the assignee to show such transfer. Dambmann v. White, 48 Cal., 439. But by section 70 of the present law the title to the bankrupt's estate is vested in the trustee, hence the production of a transfer to him can not be required. In the case just cited the assignee produced a transfer to him by the register, and this was held sufficient to vest title in the assignee, without proof of his appointment. In this case the law vests the title, and it is, therefore, not a question of title, but simply of the right of the trustee to recover in that capacity. We conclude that there is no merit in the contention that the intervener was bound to prove his appointment and qualification as trustee.

It may be conceded that the drug company, by its purchase at execution sale, acquired title only to De Gaugh's interest in the tangible property of the firm of Jones & Simmons, and that the sale operated as a dissolution of the firm. Upon the sale, Jones and the drug company became joint owners of the stock of merchandise belonging to the late firm. The business was carried on as before, by Jones and De Gaugh, from the date of the sale in May, 1896, to the time of the trial in November, 1899. The stock of merchandise owned by Jones and the drug company was largely sold out by Jones and De Gaugh, and the stock was replenished and kept up out of the proceeds of such sales. The business, as conducted by Jones and De Gaugh after the sale, was

prosperous, and the property belonging to the business was of greater value at the time of the trial than at the date of the sale. We are of opinion that the drug company should not have been limited in its recovery to the goods bought by it which were actually in stock at the time of the trial. It was not bound to sue for the specific property bought, but could require Jones and De Gaugh to account to it for the interest owned by it in the property converted by them, and the facts above stated would constitute a conversion. The drug company has an interest in some of the property sued for, and is entitled to compensation for its property that has been converted. The evidence is not sufficient to show the extent of plaintiff's interest in the property in controversy, nor the value of its goods that were converted. This might be fatal to its recovery, but for the fact that the intervener was entitled to recover all of the property sued for, except that part which the plaintiff was entitled to recover. The judgment was in favor of the plaintiff and intervener for all of the property in controversy, and together they were entitled to such recovery. As between themselves, their respective interests in the recovery could be settled only by trial of the issue, or by agreement. There was an agreement between them, which was made a part of the judgment, entered into before the trial, by the terms of which, in case of a recovery by either or both, the proceeds thereof were to be divided between them, the plaintiff to be first paid the sum of $3750, and the intervener the remainder, if any. This agreement obviated the necessity of a finding fixing their several interests in the property recovered. Jones was not injured by it, since none of his property was taken. De Gaugh can not complain because, even if the plaintiff was not authorized to recover any of the property, the intervener was entitled to recover all of it.

The appellant Simmons complains of the charge of the court relating to the issue as to his ownership of the property in controversy and of many rulings of the court on the admission of evidence, and that the findings on that issue is contrary to the evidence. We think that the charge fairly submitted to the jury the question as to whether Simmons or De Gaugh was the real purchaser of the interest of Howard in the business owned by Jones & Howard. If Simmons loaned De Gaugh the money to buy the stock, and the purchase was made for De Gaugh, though the title was taken in Simmons' name for the purpose of protecting the property from De Gaugh's creditors, then, as stated in the court's charge, the property belonged to De Gaugh, and was subject to the levy of plaintiff's writ. While the evdence on this issue was slight, it was sufficient to suggest the issue, and we can not say that it was error to submit that theory of the case to the jury. We think that there is no real ground for the complaint that the charge of the court makes too prominent the issue as to the purchase in Simmons' name being a mere device to cover up De Gaugh's property.

Evidence as to Simmons' financial condition, both before and after the alleged purchase by him of Howard's interest in the drug business,

and statements made by him in relation thereto, was admissible as tending to prove whether he was the real purchaser and had the money to pay for the property. And evidence concernng De Gaugh's failure in business and insolvency was admissible as tending to show a reason for his making the purchase in the name of another, and evidence that De Gaugh, though insolvent, had some money, was admissible as tending to prove ability on his part to make the purchase. Statements made by De Gaugh concerning the purpose of an attempted purchase of a stock of drugs by him, though made when Simmons was not present, was admissible, the jury being instructed that they could not consider the same unless they found that there was an agreement between Simmons and De Gaugh by which De Gaugh was authorized to use Simmons' name to cover up property he might buy, and that the statements were made in pursuance of the agreement. The statements made by De Gaugh to Boyd, which were offered by the appellants and excluded by the court, were hearsay and self-serving, and not admissible. They were not shown to have been made in the conversation between De Gaugh and Pergrin, which conversation had been proved by the appellees. If offered for the purpose of impeaching Pergrin, no predicate for their introduction had been laid.

The evidence upon the issue as to whether Simmons or De Gaugh was the real purchaser from Howard was conflicting. It was sufficient to have warranted a finding either way. In such case we would not be justified in setting aside the finding of the jury upon the question of fact.

Immediately after the return of the verdict the appellees asked for the appointment of a receiver. The application was heard and granted, and the appellant Jones was appointed receiver and duly qualified as such, his disqualification being waived. The appellants complain of the appointment as being unwarranted. It was shown that Jones was solvent and able to respond in damages, should he waste or misappropriate the property pending the appeal. It is insisted that under article 1465, Revised Statutes, and the decision of this court in Bank v. Dunham, 18 Texas Civil Appeals, 184, the application for a receiver should have been denied. On the other hand, it appeared that De Gaugh was insolvent, and was in the possession and had the management of the property. And the trial court was justified in finding that he was likely to misappropriate the property, and that it was, therefore, in danger of being lost to the appellees. Besides, the receiver was appointed after a verdict had been rendered on a final trial and the interests of the parties in the property in controversy had been legally adjudicated, and the object of the receivership was to carry out the provisions of the judgment, which directed the sale of the property and the payment of the proceeds of the sale, one-half to Jones and the other half to the appellees. These facts distinguish this case from the case cited, when the application was made before judgment, and its object was simply to preserve the property and those in possession of it were

solvent. There were some objections to the manner in which the appointment was made, but we think there is no merit in any of them.

So many questions are presented that we have found it impracticable to discuss them all. We have therefore considered in this opinion only those questions which appeared to us to be of the greatest importance.

We find no reversible error in the record and the judgment is affirmed.

Affirmed.

MARY L. MURPHY v. AMERICAN CENTRAL INSURANCE COMPANY.

Decided October 21, 1899.

1.—Fire Insurance—Total Loss of Building.

Under the article of the statute making fire insurance companies liable for the full amount of the policy in a case of total loss of property other than personal, a building is to be regarded as a total loss where the remnant left is inconsiderable, compared with the part entirely destroyed, and is not such as to constitute a sufficient basis upon which to restore the structure. Rev. Stats., art. 3089.

2.—Same—Use of Wall in Rebuilding.

The fact that part of one wall of a brick building destroyed by fire was used in constructing another building on the site of the destroyed one, the wall so used being a division wall and such use of it being over the protest of the constructors, does not prevent the loss of the building from being a total one within the meaning of the statute. Insurance Company v. Garlington, 66 Texas, 103, followed, and Insurance Company v. McIntyre, 90 Texas, 170, distinguished.

3.—Same—Foundation of Building Not Considered.

In determining whether there has been a total loss of a building by fire, the foundations are not to be considered, as the contract of insurance is made with reference to the part of the structure above ground.

Appeal from Grayson. Tried below before Hon. Don A. Bliss.

Mosely & Smith, for appellant.

Kearby, Muse & Oeland, for appellee.

RAINEY, ASSOCIATE JUSTICE.—Appellant sued to recover on an insurance policy which covered a building belonging to appellant that had been destroyed by fire. A total loss was alleged by plaintiff. This was denied by defendant company, which contended that the injury to the building was only partial; that an appraisement of the loss was had under the terms of the policy, and the damages awarded was $1298.21. On a trial before a jury a verdict and judgment were rendered for defendant company for the amount of the award, from which this appeal is prosecuted.

On the issue of a total loss the court charged the jury as follows: "You are instructed that under the law of this State there can be no total loss of a building so long as a remnant of the structure standing

is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury; and whether such remnant remaining standing is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the building was before the fire, would in proceeding to restore the building to its original condition, utilize such remnant as such basis.

"Therefore, unless you believe from the evidence that, after the fire which burned the building belonging to the plaintiff, upon which the policy of insurance sued upon in this case was issued, no remnant of said building was left standing that was reasonably adapted for use as a basis upon which to restore said building to the condition in which it was before the fire, such as a reasonably prudent owner, uninsured, desiring such a building as the building was before the fire, would, in proceeding to restore the building to the same condition that it was in before the fire, utilize said remnant as such basis, you will find for the plaintiff the amount of the award, with interest as hereinafter stated.

"But if you believe from the evidence that after the said fire there was no remnant of the said building left standing that a reasonably prudent owner, uninsured, desiring such a building as said building was before the fire, would have utilized as a basis upon which to restore said building to the condition in which it was before the fire, you will find for the plaintiff the full amount of the policy herein sued on, to wit, the sum of $2000, with interest thereon at the rate of 6 per cent per annum from the 14th day of May, 1898, to the present date.

"So, of course, if you believe from the evidence that, after said fire, there was left standing a part of one of the walls of said building and the foundation of said building, or a part of said foundation was left standing in such a condition that a reasonable prudent owner, uninsured, would have used such part of said wall or such foundation or such part of said foundation as a basis upon which to restore said building to the condition in which it was before the fire, you will find for the plaintiff the amount of said award, to wit, $1298.21, with interest as before stated."

Appellant requested the following special charges, which were refused, to wit: "In arriving at the determination as to whether or not plaintiff suffered a total loss of the building insured, as contemplated by our statute, you are charged that you are not to take into consideration portions of material lying around and out of place in the building, although you may believe that such material was not destroyed. The true test is, was any substantial portion of the building left standing above the surface of the ground in such condition and extent as to be reasonably suitable as a basis upon which to reconstruct said building in like condition as it was before the fire as to strength, security and utility?"

"The Legislature of this State has provided that when an insurance policy is granted on a building on land, and the building is totally destroyed by fire, the policy shall be held as a fixed demand for the full

amount thereof. So, in this case, if you should believe from the evidence that plaintiff's building was totally destroyed by the fire, you will find in her favor against defendant for the sum of $2000, with interest thereon at the rate of 6 per cent per annum from the 10th day of May, 1898, to the present time. Now, in determining whether or not plaintiff has sustained a total loss, as used in and intended by our statutes, you are charged that the words 'total loss,' as used by the statute, does not mean the utter destruction of the materials that entered into the construction of the house, but that, by reason of the fire, the building has lost its specific character and identity as a house, and that there was no substantial or considerable portion of the building left standing in such a condition that by using the same in the reconstruction of a building, that is, by building thereon a house similar to the one burned, the insured would secure a building substantially as good and suitable as the one burned." Which action of the court is assigned as error.

Appellant complains of the third, fourth, and fifth paragraphs of the court's charge, "because the true test of the total loss of a building, as applied to the facts in this case, is not therein stated, and because the use of the word 'basis,' as used in the charge, was calculated to mislead the jury."

The evidence adduced on the trial is substantially that the building burned was a one-story brick and stone store building, 80 feet in length, 25 feet wide, and ceiling about 14 feet in the clear. East and north wall brick, and north 20 feet of west wall brick, balance of west wall all rock. Front, brick pillars and glass, as is usual in business houses. The east and west walls were division walls in which appellant owned a half interest. After the fire a two-story brick building was erected on the site of the old building. Leonard, an architect, and who constructed the new building, stated that none of the walls and foundations on the north, east, and south were used in the construction of the new building, nor was any left standing fit for use. A part of the west wall was standing after the fire. A part of this wall was torn down in rebuilding, and a part used. The part used was about from 15 to 25 feet long at the base, and in some places it was 2 feet high and ran up to a point and beveled off. He did not think it reached 12 feet in height. The foundation and wall that were used were unfit for use. He condemned the whole of the west wall, and the portion that was used, was used over his protest. The portion used was so used by reason of the men who owned half of the west wall insisting on using it. After the building was reconstructed, the west wall was about three inches from a true line; this was caused by the use of the old wall. The foundation under the east wall was taken up entirely. It was not fit for use. The north side was quite as bad, in his opinion. The foundation on the south side was not quite as bad, but not as bad as the two longitudinal walls. The back foundation was not used; it was not fit for use. The back wall of the new building was put in a different place. There were no joists left that could be used in the reconstruction of the new

building, nor any flooring. There were some rocks left that were fit for use. There were a few sills on the south foundation, but they were not fit for use; none fit for use were left in place on the rear wall. Two window sills fell from their places; one was cracked and one very much injured, apparently. These were not used in rebuilding.

Zoratto, who acted as umpire in the appraisement, testified that the only foundation used was the fcundation of the middle wall between the east and west wall, which was a good foundation. The piece of wall left standing was not in first-class condition.

Dawson testified that he worked as a carpenter in the construction of the new building. That all the walls were new, except on the west side there was a little piece of the old wall used. It was probably 10 or 12 feet high in the center and tapered down until it was probably 15 or 20 feet long at the base, and in shape of an inverted "V."

McGowen testified that, "in the construction of the new building upon the site of the old one that was destroyed by fire, there was nothing left of the east wall or foundation upon which to build, and no portion of the north wall or foundation, and no portion of the south wall or foundation. There was a very little piece of the west wall and a part of the foundation left and used. It was a small piece of wall, just a few feet high. The wall that was used was not straight; was not on a true line north and south."

O'Reilly, witness for defendant testified as follows: "I came to Denison from Dallas at the request of the adjuster for the insurance company. This is my first appraisement for this insurance company, but have been called upon to appraise for others occasionally. I was selected by the underwriters to make a survey of the property in the city of Dallas. They selected me from the architects and builders of Dallas to discharge duties of that kind. I have served companies occasionally that way, more or less, since then. I came to Denison to serve as an appraiser for the insurance company in making the award. We figured in as sound material the west wall of the building, extending from the front to the rear, 60 feet long and 22 feet high and some inches. We concluded that the wall was good. We figured on using the foundation of the back wall and the foundation of the east wall and foundation and sills and bases of the columns, together with a couple of the columns on the front wall. Also we figured on using 57 of the joists on which the flooring was laid. Also some window sills, and from 60 to 75 per cent of the flooring. This is what we figured as sound. Plaintiff was not allowed anything in our estimate for damage or loss to them. The debris had not been cleared away when we did our figuring. We did not figure the east wall, because it was not there, nor the north wall, because it was not there; only such portions of the south wall that was there, that is, bases or flints; none of the south wall was there except that. The south wall was down; the north wall was down; the east wall was down. We examined the foundation as far as it was exposed to the eye. We could examine from 10 to 14 inches of the

foundation, as well as I can recollect. We determined that the foundation was all right, except that it was damaged to the extent of $5 to the north end. We examined the wall on the west side and found no crack. We found the wall plumb on a tangent. We concluded that the foundation was good on all sides except the rear, and that could be repaired for $5. We found that the west wall was good 60 feet long and 22 feet high. The total length of the west wall was 80 feet, but only the first 60 feet was rock, the back 20 feet was of brick. This back 20 feet was damaged, but the rock portion, 22 feet high and 60 feet long, we concluded to be good. The foundation of the west wall was not damaged. We examined it from observation, and it did not show any indication of damage by fire. This was a short time after the fire."

Under the foregoing facts the question arises, did the court present to the jury the proper test to govern them in determining whether or not there was a total destruction of the building as contemplated by article 3089, Revised Statutes, which provides: "A fire insurance policy, in case of total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy; provided, that the provision of this article shall not apply to personal property."

In the case of Insurance Company v. Garlington, 66 Texas, 103, the question at issue was whether or not there was a total loss of the building by fire. The trial court in that case found that "the east wall of it (the building) was entirely destroyed. The roof was destroyed. Almost one-half of the interior of it (extending from the foot of the east wall to the top of the west wall) was destroyed. The front of it was partly lying on the street and partly hanging, liable to fall at any time. Thus it had lost its specific character as a building, and was unfit for use as a hotel or for other purposes, and was a total loss." No mention is made of the destruction or injury to the other two walls, from which the natural inference is that they were left standing and uninjured. Justice Stayton, in passing upon that state of facts, said that they justified the conclusion reached by the trial court that *it was a total loss,* and that "it was the building insured—a specific thing, and not merely the material of which it was constructed." He also adopted as correct the rule announced in the case of Williams v. Insurance Company, 54 California, 540, as follows: "A total loss does not mean an absolute extinction. The question is not whether all the parts and materials composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building. Although you may find the fact that, after the fire, a large portion of the four walls were left standing, and some of the iron work still attached thereto, still, if you find that the fact is that the building has lost its identity and specific character as a building, you may find that the property was totally destroyed within the meaning of the policy."

If this is the correct rule in determining a "total loss" of a building, then, under the facts of this case, the test applied by the trial court in its charge in this case was error, and the special charges asked by appellant's counsel should have been given.

The learned trial judge followed the test announced by Justice Denman in the case of Insurance Company v. McIntyre, 90 Texas, 170, evidently deeming that the rule in that case applied to this. The facts of that case and the one under consideration are so entirely different as to the extent of loss that the rule stated in the former case, "that there can be no total loss of a building so long as the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury," in our opinion is not applicable here. In that case the facts clearly show that the building was only partially injured, and the part left standing and uninjured greatly exceeded in value the part injured, and the building could have been repaired at much less cost than to have rebuilt. The condition of the building after the fire was such as to fully warrant the conclusion reached in that case by the able justice. No such condition exists in this case. Only a small portion of the burnt building was used in the construction of the new building, and this was used by the direction of one of the owners of that partition wall, over the protest of the constructors who considered it unfit for use. The remnant of the burnt building was in our opinion, under the evidence, inconsiderable, compared with the part entirely destroyed, and did not constitute a sufficient basis upon which to restore the burnt building. The building constructed on the site of the burnt building was practically a new building in its entirety, and can not be considered the old building repaired or restored, but it is essentially a new structure. In our opinion, for a remnant of a burnt building to be "reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury," it must be a substantial portion of the building remaining standing fit for use, and such as that its identity as a building has not been totally destroyed; or, in other words, the remnant must be of that substantial character as that when restored or repaired it will be considered the old structure and not considered a new one. It is difficult for the court to so define what constitutes a total loss of a building by fire in which the distinguishing line between a total and partial loss can be determined in all cases, but the distinction must rest upon the particular facts of each case. As before stated, the facts in this case in our opinion show a total loss of the building under consideration, and warranted an imperative instruction to that effect.

We are of the opinion that the court erred in instructing that the jury might consider the injury to the foundation in reaching a conclusion as to a total loss. We think the weight of authority to be that, in making the contract for insurance, it was contemplated that the foundation would not be destroyed, but that the contract was entered

into with reference to that portion of the structure above ground. O'Keefe v. Insurance Co. (Mo.), 41 S. W. Rep., 922, and authorities cited.

We deem it unnecessary to discuss the question raised as to the rulings of the court on the appraisement, as such become immaterial under our view of the case as heretofore expressed.

The judgment is reversed and cause remanded.

Reversed and remanded.

[NOTE.—After the remand of this cause, and upon another trial had below, the jury were instructed to find for plaintiff the full amount of the policy, upon the ground that the loss was a total one. The judgment was for plaintiff accordingly, and, upon a second appeal, was affirmed by the Court of Civil Appeals (61 Southwestern Reporter, 956), and writ of error was denied by the Supreme Court.]

FIRST DISTRICT, 1901.

GEORGE CORDRAY ET AL. v. C. L. NEUHAUS.

Decided February 1, 1901.

1.—Jurisdiction of District Court—Tax Suits—Presumptions—Collateral Attack.

Where a special and limited authority has been prescribed for a court of general jurisdiction, as in enforcing a sale of land for taxes, nothing is taken by intendment in favor of its action, even in a collateral attack on its judgment, but it must appear by the recitals of the record itself that the facts existed which authorized the court to act, and that it acted within the limits of its authority.

2.—Same—Galveston City Charter.

The Galveston city charter of 1871 and ordinances thereunder had the effect of rendering the jurisdiction of the District Court of Galveston County in the sale of lands for taxes a special and limited one.

3.—Same—Void Judicial Sale for Taxes.

A sale of land for city taxes, made to the city under decree of the District Court of Galveston County foreclosing the tax lien, conferred no title where the amount of such taxes was less than $100, and the city charter and ordinances were not complied with in that notice of the sale was given for only twenty-two instead of thirty days, and that no confirmation of the sale was ever had.

4.—Purchaser at Judicial Sale—Effect of Reversal of Judgment.

Where the plaintiff purchases land under his own foreclosure proceedings, and conveys it to a purchaser for value, a subsequent reversal of the judgment upon writ of error sued out by the defendant therein, operates to extinguish the title of such second purchaser.

5.—Judgment by Confession—Power of Attorney—Estoppel.

Where a landowner empowered her attorney to confess judgment for a given amount of lien debt, and he confessed judgment for a much larger amount, the letter of attorney being copied into the judgment entry, the owner of the land

was not estopped from asserting her right to have set aside a foreclosure sale of the land made under the judgment which thus showed on its face to be unwarranted.

Appeal from Galveston. Tried below before Hon. Wm. H. Stewart.

L. E. Trezevant, for appellants.

Kleburg & Neethe, for appellees.

GARRETT, CHIEF JUSTICE.—This action was brought by the plaintiffs in error against the defendants in error for the removal of cloud from the title of plaintiffs to lot No. 9, block 21, in the city of Galveston, and for partition between themselves. It was averred in the petition that the defendants were asserting a claim of ownership and title to the lot which was a cloud upon the title of plaintiffs. The defendants pleaded their title specially, and plaintiffs raised the questions presented on the trial and in this court by demurrers to the answer, and motion for a new trial. The demurrers were overruled by the court, and upon a hearing of the facts, the court, sitting without a jury, rendered judgment in favor of the defendants.

Kate Cordray is common source of title, and the plaintiffs, except Jonas Grosmayer, are her heirs, and claim an undivided one-half of the lot. Grosmayer claims the other half by mesne conveyances from her. As alleged in the answer and shown by the facts, Kate Cordray was the wife of T. J. (Julius) Cordray. The lot in controversy was her separate property. She died October 21, 1896. On May 22, 1876, the city of Galveston brought a suit in the District Court of Galveston County, No. 8903, against Mrs. Kate Cordray for the recovery of $16 and interest, alleged to have been levied and assessed as city taxes for the year 1875 on lots 8 and 9, block 21, and for the sum of $17 and interest, aleged to have been levied and assessed as city taxes for the yesar 1875 on lot No. 9, block No. 612, the property of Mrs. Kate Cordray. Mrs. Cordray's husband was not made a party to the suit. On July 19, 1876, a judgment was rendered in said suit in favor of the city of Galveston against Mrs. Cordray for the gross sum of $36.46, with 8 per cent interest, which was adjudged to be a lien upon lots 8 and 9, block 21, and lot 9, block 612, and the same were ordered to be sold as under execution for said sum with interest and costs of suit. On the 6th day of June, 1877, an order of sale was issued on said judgment by the clerk of the District Court of Galveston County, directed to the sheriff of said county, commanding him to sell said property as under execution for the satisfaction of the said sum of $36.46, with interest thereon at the rate of 8 per cent per annum from July 19, 1876, and the sum of $9.45 costs of suit, and the further costs of executing the writ. The sheriff received the writ on the 8th day of June, 1877, and on the 12th day of June, 1877, advertised said property for sale on the first Tuesday, the 3d day

of July, 1877, by causing an advertisement thereof to be posted up in three public places in the county of Galveston, one of which was at the door of the courthouse of said county; and on the 3d day of July, 1877, being the first Tuesday in said month, the sheriff sold said property at public vendue in front of the courthouse door, and the city of Galveston having bid therefor the sum of $57.81, a sum sufficient to satisfy the judgment, and that being the highest and best bid for the same, it was struck off and sold to the city of Galveston for said amount. The writ was returned satisfied. It does not appear that any deed was ever executed. [But see corrected conclusions at end of the opinion.] It was shown by the evidence that lot 9, block 612, was the homestead of the defendant Kate Cordray and her husband, J. T. Cordray.

On May 27, 1880, the city of Galveston brought a suit in the District Court of Galveston County, No. 10,201, against Kate Cordray and her husband, Julius Cordray, to recover the sum of $1687.92 as the amount expended by the city in filling lots 8 and 9, block 21, in the city of Galveston, alleged to be the property of Mrs. Kate Cordray, for which the city claimed a lien under its charter and ordinances. In this suit a judgment was rendered on August 15, 1880, in favor of the city for the sum of $2936.98, with foreclosure of lien upon lot 9 in block 21, by confession of their attorney under a power to confess judgment for the amount expended by the city, with a decree that lot 9 only should be sold. In pursuance of said judgment, lot 9, block 21, the property in controversy, was duly sold on October 15, 1880, and the city of Galveston became the purchaser thereof for the sum of $600, and the sheriff executed to the city a deed therefor.

On January 13, 1882, Henry Sayles recovered judgment against the city of Galveston in the District Court of Galveston County for the sum of $2937.85, and by virtue of an execution regularly issued upon said judgment the property in controversy was levied upon and sold on March 7, 1882, and one Edward Garratt became the purchaser thereof for the sum of $285, and a deed was executed to him therefor by the sheriff, and from Edward Garratt the said property passed by mesne conveyances to the defendants, whose deed from one J. C. Kirschner is dated October 18, 1890, and is a general warranty deed for a consideration of $2000. The respective purchasers paid full value for the property at the time of their purchases.

On June 30, 1893, Kate Cordray, joined by her husband, sued out a writ of error from the judgment rendered against her in cause No. 10,201, and on April 15, 1894, said judgment was reversed by this court and the cause remanded to the District Court of Galveston County for another trial. 26 S. W. Rep., 245. On July 6, 1899, after said cause had been reinstated on the docket of the District Court and continued for several terms, the city of Galveston by its attorney dismissed the same, and disclaimed all title to the said lot 9, block 21. The property in controversy is and always has been a vacant lot, and has not been in the possession of any person other that Kate Cordray and her husband

until February 10, 1897, when the defendants took and remained in possession thereof until dispossessed by the sheriff of Galveston County by virtue of a writ of possession issued in cause No. 10,201 upon its dismissal by the city. No taxes were ever paid on the lot No. 9, block 21, by Kate Cordray or anyone for her or her heirs after the rendition of the judgment in favor of the city in cause No. 10,201; but all taxes upon said lot have subsequently been paid thereon by the said Garratt and those holding under him, the defendants having paid all taxes accruing since their purchase. Neither the defendants nor any of the purchasers of said property under said execution sale against the said Kate Cordray had any knowledge that said Kate Cordray or her heirs or assigns were dissatisfied with the judgment in said cause No. 10,201, and were without any personal or actual knowledge at the time of their respective purchases, or at any time, that Kate Cordray was a married woman, or that she intended to appeal said cause by writ of error, but the petition and judgment disclosed the fact that she was a married woman, and the authority to confess judgment for only the amount expended was set out in the judgment.

Upon the trial below plaintiff put in evidence an ordinance of the city of Galveston which was in force at the time that the tax suit No. 8903 was instituted, and, so far as it is relevant or pertinent to the issues in this case, is as follows:

"Section 14 of article 1 of chapter 39 of the Revised Ordinances of the City of Galveston of the Year 1871:

"Section 1. That in all cases where any tax shall be or may hereafter become due upon any property, the city may, in addition to the remedies hereinbefore provided, institute suit in the District Court of Galveston County for the recovery of the same, and may in the same suit pray a foreclosure of the lien upon such property, accruing by reason of the assessment of such tax. The petitions in any such suit shall state the property proceeded against and the tax due on the same as near as may be, and also the rate of interest due on said tax, as prescribed by city ordinance; and the gross amount of taxes claimed in any such petition must be one hundred dollars or over. In rendering judgment, each piece or parcel of land shall be condemned separately as near as may be, save that several lots in the same block may be condemned together; and it shall be the duty of the sheriff of the county of Galveston, at any time after such condemnation by the court to make sale of the same in the manner prescribed in the city charter, and subject to the redemption therein specified."

If either one of the two execution sales relied on by the defendants were valid, the plaintiffs were not entitled to recover. When there is no actual prohibition either in the Constitution or the statute, an action of debt lies for the collection of taxes, and the lien therefor may be foreclosed in the district courts of this State. Cave v. City of Houston, 65 Texas, 619; City of Henrietta v. Eustis, 87 Texas, 16. If the district court, in the exercise of its general jurisdiction, can entertain a

suit for the recovery of taxes and the foreclosure of a lien therefor, its judgment is conclusive of the regularity of the legal requirements in the levy and assessment of the tax; and a foreclosure sale for the satisfaction of the judgment should be made in the usual manner of such sales generally, and would not be held invalid for irregularities in a collateral attack such as has been made in this case. Unless the District Court of Galveston County could only exercise a special jurisdiction when it foreclosed the tax lien in cause No. 8903 and had the property of Kate Cordray sold, it seems that the sale under the judgment in that case was valid, and that title was vested in the city by its purchase thereat. It does not appear that a deed was executed to the city by the sheriff, but this was not necessary. The title of the purchaser of land at a sheriff's sale does not depend upon the deed. It rests upon a valid judgment, levy and execution sale, and the payment of the money. Donnebaum v. Tinsley, 54 Texas, 365; Flanneken v. Neal, 67 Texas, 631. But a special and limited jurisdiction may be prescribed for a court of general jurisdiction in the sale of land for taxes, and when this has been done, nothing is taken by intendment in favor of the action of the court; it must appear by the recitals of the record itself that the facts existed which authorized the court to act, and that in acting the court has kept within the limits of its lawful authority. Cooley on Tax., 525, 526. By the Constitution of 1869 (article 12, sections 20, 21) the annual assessment of taxes on land was made a lien thereon, but no landed property could be sold for the taxes due thereon except under a decree of some court of competent jurisdiction. In pursuance of these provisions of the Constitution the Twelfth Legislature, in granting a charter to the city of Galveston by a special law approved May 16, 1871, provided that all taxes should be a lien upon the property upon which they were assessed, and for a proceeding in the District Court of Galveston County for the sale of real estate. Charter of Galveston, tit. 6, arts. 10, 14 (Spec. Laws 12th Leg., 1st Sess., pp. 370, 371); 6 Gammel's Laws, 1509. Article 14, which provides for the sale of real estate, read as follows:

"Section 1. That the foregoing provisions under head of title 6, relating to notices, assessments, and collection of taxes on personal property, and all other provisions thereof not inconsistent with this section, shall also apply to real estate, but that no sales of real estate shall take place unless by decree of the District Court of Galveston County, at some regular term thereof; and the city council may by ordinance enact the mode and manner in which such suits for collection of taxes due and unpaid on land shall be instituted, and may have such other and further power regulating the proceedings necessary for the sale of lands as it thinks best and is not inconsistent with the laws and Constitution of this State, provided, that no sale shall be made until the owner has thirty days' notice thereof, which notice may be given actually by any officer of this city, or by advertisement for sixty days, which advertisement may merely so describe the property, as to designate it, and it shall not be necessary to set out the owner's name, unless the same is

known; and further provided, that such owner, his agent or attorney, may redeem said property within two years from the day of sale, by paying the purchaser or purchasers the full amount of his bid and costs of suit, with interest thereon at the rate of 12 per cent per annum from day of sale; and further provided, the purchaser or purchasers may apply to the district court at any time after said expiration of two years for confirmation of sale, and which said decree of confirmation shall vest full and absolute title in the purchaser or purchasers of said property, their heirs or assigns; and said district court shall take and exercise all jurisdiction required to carry this into effect, and such ordinances as may be passed by the city council relative to the subject matter."

Article 1 of title 6 provides that the city council "may and shall make all such rules and regulations, and ordain and pass all ordinances as they may deem necessary to the levying, laying, imposing, assessing, and collecting of any of the taxes herein provided." P. 366. The suit was brought after the adoption of the Constitution of 1876, but there is nothing in that instrument inconsisitent with the charter and ordinances prescribing the mode of precedure for the sale of land for taxes. Other provisions of the charter contemplate a sale of land by the collector, but these are subordinate to the controlling requirement that it can only be sold by a decree of the district court. The charter and ordinances passed in pursuance thereof must be construed as prescribing the mode of procedure in the district court to have land sold for taxes. They prescribe a different rule for the sale from that followed under the general powers of the court, and confer only a special and limited jurisdiction on the court. Such being the case, it was necessary to a valid sale in the first place that the court should have had jurisdiction of the amount which was by the ordinance fixed at $100 or more, and after judgment that all the requisites prescribed for the sale should have been complied with; and the authorities relating to sales by the collector are applicable to the sale made by the sheriff under the decree of the court when it is exercising only limited and special jurisdiction.

There are quite a number of objections to the validity of the sale: (1) The amount of the taxes was less than $100; (2) the gross amount of taxes were adjudged to be a lien on the property in bulk and the property was sold in bulk, the homestead being included with the other property, and the manner of sale was not as prescribed by charter; (3) the notice required by law was not given; (4) no deed for the property was executed; and (5) no confirmation of the sale was ever had. It would seem from the facts that no deed was executed and that the city took no steps to have the sale confirmed, but sought to charge Kate Cordray and her husband personally and the property with a lien for filling it under the sanitary ordinances of the city,—that it had abandoned any claim under the tax suit. We are of the opinion that no title ever became vested in the city by reason of this tax sale.

At the time of the sale of the lot under the execution issued on the judgment of Henry Sayles v. City of Galveston, the city had obtained a

judgment against Kate Cordray and Julius Cordray for the sum of $2936.98 with foreclosure of a lien on the lot, without execution over, and the lot had been sold under the decree of foreclosure and bought by the city for the sum of $600. The city's judgment when it had the lot sold in satisfaction of its lien had not been appealed from and was unreversed and in full force, and it was not reversed until long after Garratt bought it at execution sale against the city, and until long after the defendants acquired their title. It is well settled that where there has been sale under execution of lands or goods and a stranger is the purchaser bona fide, his title will not be affected by a subsequent reversal of the judgment. Stroud v. Casey, 25 Texas, 754. The city purchased at its own sale, and if the title had remained in it at the time of the reversal of the judgment, there could be no question but that it would have become extinguished by the reversal. But was Garratt a stranger to the suit so that he would be protected in his purchase. "It is a rule nowhere disputed that third persons purchasing at a sale made under the authority of a judgment or decree, not suspended by any stay of proceedings, thereby acquire rights which no subsequent reversal of such judgment or decree can in any respect impair." 2 Freem. on Judg., sec. 484. There are some courts which hold that while the title of the plaintiff in execution would be annulled by a reversal of the judgment, a conveyance by him to a third person, purchased in good faith before reversal, would be protected. 2 Freem. on Judg., sec. 484, citing cases from Illinois and Missouri. Kentucky stands almost alone in holding that the title of the plaintiff in execution himself would not be affected by the reversal. Parker v. Anderson, 5 T. B. Mon., 455. See Freem. on Judg., supra. But it is believed that the rule is settled otherwise in this State, and that a purchaser from the plaintiff in execution who had bought at his own sale will not be protected. Harle v. Langdon's Heirs, 60 Texas, 564; Adams v. Odom, 74 Texas, 213. The assignee of the plaintiff is in no better attitude than the plaintiff himself. Dembitz, in his work on Land Titles, says: "The weight of opinion gives to a purchaser from the plaintiff no greater right to hold on to his purchase than he has himself; the estate gained by the plaintiff at a sale under an erroneous judgment being held in the light of a defeasible fee, which does not become absolute by being sold to a party ignorant of the defect." 2 Dembitz on Land Titles, p. 1229. See also other authorities cited by Dembitz and Freeman; 2 Black on Judg., sec. 955. It is not deemed necessary to analyze or discuss the cases decided by our Supreme Court. It is believed that they are directly in line with the rule as stated. The purchase by Garratt at execution sale against the city was just as though he had bought directly from the city. Ayres v. Duprey, 27 Texas, 606, citing Cooper v. Blakey, 10 Ga., 253. The title of the defendants fell with the reversal of the judgment.

It is urged that Kate Cordray is estopped by her confession of judgment from denying the validity of the sale; and in support of this contention counsel have cited Railway v. Blakeney, 73 Texas, 180; Stafford

v. Harris, 82 Texas, 178; Ryan v. Maxey, 43 Texas, 192; Cravens v. Booth, 8 Texas, 243. The letter of attorney given by Mrs. Cordray to her attorney to confess judgment was copied into the judgment entry, and showed by its terms that he had no authority to confess judgment for more than the amount expended in filling the lots, but judgment was entered for nearly twice as much, and showed on its face that it was unauthorized and erroneous. Mrs. Cordray was certainly not estopped from asking to have it set aside. We are of the opinion that the judgment of the court below should be reversed, and that judgment should be here rendered in favor of the plaintiffs in error, and it is so ordered.

Reversed and rendered.

CORRECTION OF CONCLUSIONS OF FACT.

GARRETT, CHIEF JUSTICE.—We were mistaken in saying that it did not appear that any deed was ever executed in the tax case No. 8903. On the contrary, the record does show that a deed was executed to the City of Galveston by the sheriff who made the sale, and the conclusions heretofore filed are corrected so as to show that fact.

Writ of error refused.

SCREWMEN'S BENEVOLENT ASSOCIATION v. MARY T. O'DONOHOE.

Decided February 4, 1901.

1.—Mutual Benefit Insurance—Fine—Forfeiture.

The entry of a fine against a member by the secretary of a benevolent association, without notice, will not affect his financial standing so as to work a forfeiture of his benefit death certificate by placing him in arrears, where neither the constitution nor the by-laws clothed the officer with such power.

2.—Same—Provision as to Fine Not Self-Executing.

Where the constitution of a benevolent association provided that on a certain day of each year all members should join in a labor day parade, and that any member failing to so attend should be fined $2.50, such provision was not mandatory and self-executing in the sense that the mere fact of absence from parade had the effect to make the sum a charge against the member.

Appeal from the County Court of Galveston. Tried below before Hon. Morgan M. Mann.

Austin & Rose, for appellant.

Noah Allen and *R. H. Tiernan,* for appellee.

ON MOTION FOR REHEARING.

GILL, ASSOCIATE JUSTICE.—Ths cause was affirmed without written

opinion. A motion for rehearing has been submitted in which the reasons presented for the reversal of the judgment are again urged with great earnestness and force. We are also requested to set forth the reasons which control us in disposing of the motion. It is not the custom of this court to write opinions in cases where it is not required, or necessary, in view of another trial, but as the questions involved seem to be of much interest to appellant, we shall briefly state our reasons for adhering to our former judgment.

The litigation grew out of the following state of facts. The appellant is a benevolent association organized for the mutual help of its members. One of its features is the payment of a death benefit to the wife or family of a member upon his death. It has no subordinate lodges, but is an institution whose membership of 500 is composed of cotton screwmen who reside in the city of Galveston, and all of its officers reside in said city.

By a provision of the constitution death benefits were payable upon the death of a member only in case he was at the date of his death in "good financial standing." A member was not in good financial standing if, at the end of any quarter ending the last day of March, June, September, or December, he was indebted to the order in excess of $2. The insured, Peter O'Donohoe, deceasd, who died January 8, 1899, was in good financial standing at the date of his death, unless a charge on the books of the order of $2.50, purporting to be a fine imposed against deceased for failure to attend labor day parade, be held a proper charge against him. Upon this ground alone the order refused to pay the death benefit, and the widow of the deceased brought this suit. The trial court, after the evidence was adduced, charged the jury to find for plaintiff, and this action is assigned as error. It was shown that deceased had paid all other charges and dues demanded by the order, and did not in fact know that the fine in question was standing on the books against him.

By section 2 of article 2 of the constitution of the order, it is ordained that on the first Monday in September of each year all members shall join in a labor day parade in uniform, to be prescribed by the order, and any member failing to so attend shall be fined the sum of $2.50. It will be noticed that no provision is made by which a member may justify his absence in any way, but the management, notwithstanding the absolute terms of the constitution, assumed the right to remit such fine if the member was too ill to attend, or was absent from the city.

No notice or trial was had for his failure to attend labor day parade, but the secretary entered against him on the books of the order a fine of $2.50, the sum named in the constitution. Neither the constitution nor by-laws, either by intendment or in terms, clothes the officer with such power. If he was thus entirely without power to impose the fine, the books stand as if it had never been imposed, and appellant is thrown back upon the contention that the article of the constitution is man-

datory and self executing, and the mere fact of the absence from the parade has the effect to make the sum a charge against him. This contention is utterly untenable. Suppose the article, instead of providing a fine for dereliction, had provided instead that the member should be expelled. Could it be contended with any show of reason that the member would stand expelled without an official ascertainment of the fact and some formal action by the order? If the fact of his absence without excuse had been officially ascertained, the officers would have no discretion in the matter, but must impose the fine. But even if a member was subject to the fine on the facts, the right to impose the penalty might be waived, the government of the order consisting of but one body of officers and they being supreme. To construe the provisions otherwise would render it so unreasonable as to make it doubtful if it could be enforced in such a way as to forfeit property rights.

A provision should be tested not by what has occurred, but in the light of what may occur. But we are not in this instance driven to speculation as to what might happen as a result of such a literal and hard interpretation of the provision. There is evidence strongly tending to show that the member was too sick to attend the parade. Had the member been charged with his offense, he might have been excused upon hearing. Or had the fine been imposed and notice given, the member would in all probability have paid it, rather than suffer his insurance to lapse. He had promptly paid all other charges for years.

It should be borne in mind that the law does not favor forfeitures. A careful inspection of the various sections of article 22 of the constitution of the order, relating to charges against members and their trial and disposition, leads us to believe that their provisions cover the imposition of fines for violations of the constitution and by-laws. They fully provide for notice and hearing, and had this course been pursued the imposition of the fine would have been final and the liability fixed. This not being done, the order is in no position to contest this claim. The amount claimed to be due at the end of the December quarter is only 50 cents in excess of what the member might have owed at his death without incurring a forfeiture. If due at all, it had been due only eight days beyond the limit. The facts were ascertained and the fine imposed ex parte by an officer without authority to do either. We therefore think the trial court correctly held that the undisputed facts showed liability and did not err in directing a verdict for the plaintiff.

Motion overruled. Judgment affirmed.

MARGIE CAPPS ET AL. v. J. G. RUSSELL, DISTRICT JUDGE.

Decided February 7, 1901.

Mandamus—Statement of Facts—Appeal—Delay.

While mandamus is the proper remedy to obtain a statement of facts on appeal where the trial judge fails to do his duty in making up the statement, the writ requiring him to do so will not issue where the relator fails to apply for it until after the time has expired in which the record should be filed in the appellate court.

Original application for mandamus.

F. B. Martin, for relators.

GARRETT, CHIEF JUSTICE.—The relator, Margie Capps, has filed an application in this court for a mandamus against J. G. Russell, judge of the Seventh Judicial District, requiring him to make out, certify, and file a statement of facts. The application shows that the relator was the plaintiff in a suit in the District Court of Gregg County, entitled No. 1215, Margie Capps and Husband v. Brown & Flewellen, for the recovery of $2400 for the rent of land; that the cause was tried before the court at the May term, 1900, and resulted in a judgment in favor of the defendants, to which the plaintiff accepted and gave notice of appeal to this court; that at the request of plaintiff an order was entered allowing ten days for the making up and filing of a statement of facts; that the term of the court expired on the 2d day of June, 1900; that four or five days after the adjournment of the court plaintiff prepared a statement of facts and submitted the same to counsel for the defendant, who did not agree thereto; that plaintiff then transmitted her statement at once to the trial judge, the respondent herein, for him to approve or make up and file a statement; that the trial judge had ample time to make up and file a statement of facts within the ten days allowed by the order, but that though often requested he had failed and neglected to make up and file a statement of facts in said cause. Relator further shows by her application that she had perfected her appeal in said cause by filing an appeal bond in due time which had been approved by the clerk, and had filed an assignment or errors; but that although another term of the district court had elapsed since said appeal had been perfected, the said trial judge had not yet made up and filed a statement of facts in said cause as was his duty.

Mandamus is the proper remedy to obtain a statement of facts where a trial judge fails to do his duty as required by law. Reagan v. Copeland, 78 Texas, 555; Railway v. Lane, 79 Texas, 648; Osborne v. Prather, 83 Texas, 210. But the application should be made without delay. Reagan v. Copeland, supra; Osborne v. Prather, supra. The relator has been dilatory, and has allowed the time within which the

record should have been filed in this court to lapse without invoking the aid of the writ. If the writ should be granted now, it would be too late for the relator to maintain her appeal. When the writ would be of no avail, it will not be granted. McWhorter v. Northcut, 57 S. W. Rep., 904, and 58 S. W. Rep., 720; 13 Enc. of Pl. and Pr., 493; 14 Am. and Eng. Enc. of Law, 1 ed., 107. Because of the delay of the relator in making her application for the writ, it will be denied.

Application denied.

F. G. BRINCEFIELD v. R. L. ALLEN.

Decided February 7, 1901.

1.—Landlord and Tenant—Breach of Lease Contract—Damages Not Too Speculative.

In an action by the lessee for breach of a farm lease, the rent for which was to be one-half the returns from sale of the products raised, plaintiff's petition, alleging his eviction, and his damages at $500, the value of his one-half of the crop which would have been raised on the farm during the unexpired term of the lease, was not subject to general demurrer on the ground that the damages were speculative, uncertain, and too remote.

2.—Same—Measure of Damages—Probable Value of Crop.

The measure of plaintiff's damages was the reasonable market value of one-half of the crop he would be reasonably expected to have raised on the premises during the unexpired term, less such amount as he earned, or by the use of reasonable diligence might have earned by engaging in a different business after the breach of the lease contract. Loyd v. Capps, 29 Southwestern Reporter, 505, criticised and limited.

3.—Same—Length of Term—Parol Evidence—Custom.

Where a written lease did not specify the length of the term, a parol agreement as to its length could be shown, and in the absence of such agreement evidence of a custom or usage in this respect could be shown under proper allegations.

4.—Same—Pleading—Demand by Lessee.

Where the lessor had breached the lease contract and evicted the lessee, a demand by the latter for a compliance with the terms of the contract is not necessary to complete his cause of action.

Appeal from the County Court of Calhoun. Tried below before Hon. M. B. Mahon.

J. W. S. Holman, for appellant.

Willett Wilson, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellant brought this suit to recover of appellee damages for the alleged breach of the following contract:

"Calhoun County, State of Texas.—Know all men by these presents that R. L. Allen and F. G. Brintzfield have this day entered into the

following contract: R. L. Allen is to furnish his team and feed for same, his farm situated about one mile from Port Lavaca, working implements and seed, and pay house rent for F. G. Brintzfield of $8 per month. F. G. Brintzfield is to farm and cultivate said land and attend to place, raising truck in a farmlike manner. R. L. Allen is to further furnish boxes, crates, nails and such stuff for shipments of produce raised. Said R. L. Allen and Brintzfield are to divide equally the returns from said place. At the end of four months, or before or after, R. L. Allen has the privilege of putting up a two-room addition to present house on said place for F. G. Brintzfield to live in, and thereby stop the payment of $8 per month rent.

"R. L. ALLEN,
"F. G. BRINCEFIELD.

"Port Lavaca, Texas, January 24th."

The petition sets out the contract in full, alleges its execution by the appellee, and the consequent liability, and promise of appellee to comply with the terms of said contract. It is further alleged in said petition that the lease of said farm under said contract was for a term of one year; that the contract of lease of said farm was more valuable for the latter half of the term of said lease than for the first half, because the fall and winter crop raised on said farm was much more valuable than the spring and summer crop; that upon the execution of said contract the plaintiff took possession of said farm and cultivated same in accordance with the terms of said contract until on or about the 16th day of July, 1900, when defendant, in violation of the terms of said contract, failed and refused to pay the $8 per month rent for the house occupied by plaintiff, and failed and refused to build for plaintiff's use the two-room addition to the house on said farm, as stipulated in said contract, and failed and refused to allow plaintiff to longer cultivate said farm, in violation of said contract dispossessed plaintiff of the use and enjoyment of said land, and refused to further comply with any of the terms of said contract. The damages prayed for in the petition were $50 for the rent of the house occupied by plaintiff for the unexpired term of said lease, and $500, the value of plaintiff's one-half of the crop which would have been raised on said farm during the unexpired term of said lease. The defendant in the court below filed a general demurrer and several special exceptions to plaintiff's petition, all of which were sustained by the court, and, plaintiff declining to amend, his suit was dismissed and a judgment for costs rendered against him, from which judgment this appeal is prosecuted.

We think none of the exceptions to this petition should have been sustained. The petition sets up a good cause of action against the defendant, and contains a prayer for general relief, and if it be conceded for the sake of argument that the damages claimed by the plaintiff are speculative, uncertain, and too remote to be allowed, still the general

demurrer to the petition should have been overruled, and plaintiff, under his prayer for general relief, would, upon proof of the breach of the contract as alleged in the petition, have been entitled to recover against the defendant nominal damages and the costs of the suit. Williams v. Wamell, 28 Texas, 610; Edgar v. Galveston City Co., 46 Texas, 221; 1 Suth. on Dam., pp. 13, 14.

It has been generally held, and the doctrine seems to be supported by the great weight of authority in this State, that where no special damage is alleged, the measure of damages for a breach by the lessor of a lease contract is the difference between the rent agreed to be paid and the actual value of the premises for the unexpired term at the time of the breach. While this rule has been generally applied to cases in which the premises had been rented for an agreed sum, it is also held to be the proper rule for the measure of damages in cases like the one at bar, in which the premises were leased for farming purposes under an agreement between the lessor and lessee that the profits to be realized from the cultivation of the farm should be divided between them. Loyd v. Capps, 29 S. W. Rep., 505. In this character of case we can not perceive how it is possible to apply the rule above quoted. In order to ascertain what rent was agreed to be paid, it would be necessary to show what would be the probable profits accruing to the lessor from the cultivation of the leased premises in accordance with the terms of the contract, and such probable profits might be shown to be largely in excess of the rental value of the premises for the unexpired term, in which event no damages could, under said rule, be recovered by the lessee. When we consider that the object sought to be obtained in laying down a rule for the measure of damages for a breach of contract is to secure an adequate and fair compensation to the injured party for the damages caused him by such breach when such damages are incidental to and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of entering into the contract, it is apparent that the rule above mentioned is inapplicable to cases like the one under consideration. While it has been held that the probable profits to be derived from a performance of a contract are too speculative and uncertain to form a safe basis for the recovery of damages for a breach of such contract, this is only true in cases in which a safer and more certain rule can not be applied. The law does not require impossibilities, and when, in any gven case, it is impossible to prove with exactness what damages have been sustained, resort must then be had to what approaches nearest to certainty. The doctrine announced by Judge Finley in the case of Loyd v. Capps, supra, that "what the plaintiff would have made by being permitted to cultivate the land is subject to too many contngencies to constitute a reliable basis for a recovery of damages for a breach of contract," is too broad and unqualified a statement of the rule.

We think it a proposition too plain for argument that the plaintiff in

this case, having made a contract from the performance of which he would ordinarily and in the usual course of events have derived profit, is damaged by the breach of said contract to the extent of the profits he would have received had such contract been performed by the defendant, and that such profits were incident to the contract and must have been in contemplation of the parties when said contract was entered into.

It has been held that the profits of a business, where the past earnings of the business are shown, can be estimated with sufficient certainty to be recovered as damages. Railway v. Dale, 72 Pa. St., 47. It would seem that the amount of produce that might be raised per acre upon a farm where the same kind of crop had been previously raised upon said farm, and its productiveness thus tested, is susceptible of as definite ascertainment as the probable earnings of a business, and the market value of such produce when so raised could be ascertained with equal certainty. To deny the plaintiff in this case the right to show the probable amount and the value of the crop which could have been raised under ordinary conditions on the premises leased by him during the unexpired term of said lease, for the purpose of measuring the damages sustained by him by the breach of said contract, is to practically deny him the right to recover damages for the injury done him, for there is no other rule for measuring his damages under which he could receive fair compensation for the injury done him by the breach of the contract. The term of the contract sued on in this case having passed since the filing of this suit, we think it can be shown with reasonable certainty what crop could have been raised upon the leased premises during the unexpired term of the contract remaining after the alleged breach. We are of opinion that upon proof of the execution and breach of the contract as alleged in his petition, plaintiff would be entitled to recover the $8 per month rent for the unexpired term of said lease, together with the reasonable market value of one-half of the crop he would be reasonably expected to have raised upon said premises during the unexpired term of said lease, less such amount as plaintiff is shown to have earned, or by the use of reasonable diligence might have earned, by engaging in a different business after the breach of said contract.

The contract sued on in this case does not show the length of time for which the premises were leased, and either party could allege and show by parol the agreement as to how long the contract was to continue, if there was such an agreement, and if there was no express agreement on this subject, evidence as to custom and usage would be admissible under proper allegations.

If defendant, in violation of his contract, dispossessed plaintiff from said premises and refused to pay the rent of $8 per month for the house occupied by plaintiff, or to further comply with his contract undertaking, no demand on the part of plaintiff for compliance with the terms of said contract was necessary to complete his cause of action, and the petition is not subject to exception for failure to allege such demand.

It is unnecessary to notice the remaining exceptions to the petition

further than to say that one of them raises an issue of fact whch can not be determined by exception, and the petition is not open to the objection raised by the other.

The judgment of the court below will be reversed and this cause remanded for a new trial, and it is so ordered.

Reversed and remanded.

H. MASTERSON v. MANSFIELD & ROOT ET AL.

Decided February 9, 1901.

1.—Partnership—Power of Partner to Bind Firm by Note for Borrowed Money.

In order for an implied power to exist in a partner to bind the firm by partnership notes for borrowed money, the business must be of a character which makes frequent resort to borrowing a necessity not existing by reason of embarrassment or the happening of some fortuitous event, but for the advantageous prosecution of even a prosperous business.

2.—Same—Firm Name Must Be Used.

Where a partner undertakes to bind the firm by the issuance of commercial paper, in the absence of express authority or some other fact fixing the firm's liability, the paper must be executed in the firm name, or else in the name commonly used by the firm in transacting its business.

3.—Same—Case Where Partner Had Not Implied Power.

For facts held to sustain a finding that no implied power existed in a partner to borrow money on the firm name, see the opinion.

4.—Practice on Appeal—Issue of Law or Fact.

Whether or not there is any evidence on an issue is a question of law, and not of fact, as to which the finding of the Court of Civil Appeals is not binding on the Supreme Court.

Appeal from Harris. Tried below before Hon. William H. Wilson.

H. & A. R. Masterson and *Love & McCord,* for appellant.

E. T. Hamblen, for appellees.

GILL, ASSOCIATE JUSTICE.—Appellant, H. Masterson, sued H. P. Mansfield and W. B. Root as partners and makers of two promissory notes payable to their own order and indorsed by them and one J. L. Hudson, to the appellant.

The appellee W. B. Root filed a separate answer in which he denied the execution of the notes sued on, and denied the partnership as alleged by the plaintiff, and also denied the authority of Mansfield to bind him or the alleged partnership by the execution of the notes.

A trial by jury resulted in a verdict and judgment in favor of plaintiff against defendants Mansfield and Hudson for the amount sued for, but that plaintiff take nothing against the defendant W. B. Root. The plaintiff alone has appealed.

The facts about which there is no dispute are briefly these: In 1898,

Kuhner, Mansfield and Neese were operating a bank at Laporte, Texas, under the firm name of "The Bank of Laporte." They also engaged in the real estate business under the firm name of the South Texas Land Company. In February, 1898, W. B. Root bought the interest of Kuhner, both in the bank and real estate business, and thereafter, on May 7, 1898, Neese withdrew from both enterprises. Neither the bank nor the real estate business had prospered, and at the date of the withdrawal of Neese the bank was in difficulties on account of the demands of depositors. After Neese's withdrawal, Mansfield and Root, after some difficulty, borrowed from T. W. House the sums of $500 and $503.65 upon notes signed "Bank of Laporte, Mansfield & W. B. Root." No other sums were borrowed by the firm in aid of the bank. Mansfield did not put in his pro rata in the bank while it was owned by Mansfield, Neese and Root, so the latter induced Mansfield to go to Fort Worth and borrow money on his own responsibility to make his deficit good. Mansfield went to Fort Worth about the —— day of June, 1898, and succeeded in borrowing $2500 by pledging collateral belonging to his wife. This relieved the necessities of the bank and enabled them to meet the demands of depositors. The deposits had never averaged more than two thousand dollars, and in all its history it made only two small loans to customers. The only money ever borrowed on the bank's account was that procured from T. W. House on the two notes above mentioned. All the business of the bank was done in the name of the "Bank of Laporte," Mansfield being cashier, and Root occasionally acting as assistant cashier.

The real estate concern did no business after the withdrawal of Neese, but its business had theretofore been done sometimes under its own firm name and sometimes in the name of the partners composing the firm.

The testimony of Mansfield and that of Root is conflicting as to whether any partnership actually existed between them after the withdrawal of Neese, but the circumstances strongly support the statement of Root that they proceeded at once to wind up the affairs of the old partnership, and that their association thereafter had no other object.

The notes sued on were drawn by Mansfield, and were dated the 13th day of June, 1898. Mansfield signed them "Mansfield and Root," and they were payable to the order of "Mansfield & Root." They were each for the sum of $2500, due respectively twelve and eighteen months after date, bore 8 per cent interest, and contained the usual 10 per cent attorney fee clause. Mansfield wrote across the back of these notes "Mansfield and Root," and turned them over to one J. L. Hudson to procure money thereon. Hudson, who officed in the same building as Masterson, negotiated them to Masterson for $4000, of which $2500 was paid in cash, and Masterson gave his due bill without interest, due in thirty days, for $1500. Masterson had Hudson to indorse the notes also.

According to the testimony of Masterson and Hudson the due bills were paid at the end of the thirty days. According to Mansfield they were paid in a week or two from the negotiation of the notes. Certain

statements in the ex parte deposition of Masterson and other facts and circumstances appearing in evidence were sufficient to require the court to submit the issue as to whether the notes were made and negotiated subsequent to the publication of notice of dissolution of the partnership, which occurred on June 22, 1891.

Mansfield had no express authority from Root to issue the notes, and Mansfield borrowed the money for his own purposes, and not for the benefit either of the banking partnership or the real estate concern. According to his own testimony he held the money to protect himself against his individual note made at Fort Worth, and none of the money borrowed ever went to the use of either partnerships. He did not advise Root of his acts, nor did Masterson advise Root of the existence of the notes, or of the fact that he held them, until fourteen months after their date, and this though there was published notice of the dissolution of the partnership on June 22, 1898, in the Houston Post and other papers, and though Mansfield sued Root for $30,000 damages on account of the dissolution of the partnership about the 1st of July of that year in the District Court of Harris County. Masterson resided in Houston, Harris County, and was a lawyer. Laporte is within thirty miles of Houston, and is connected with it by telephone, telegraph, and rail. Masterson loaned the money on the notes without inquiry of Root, and without consulting any person but Hudson and Mansfield. The latter was insolvent at the time, and Root was amply solvent. Masterson knew that he was acquiring the notes direct from Mansfield, and that Hudson was not the owner, but a go-between.

The controverted questions are: (1) Was the partnership in whose name the notes were issued of such a character as to clothe the partner Mansfield with the implied power to borrow money in the partnership name? (2) Were the notes acquired before the dissolution of the partnership and the publication of notice to that effect? (3) Did Masterson loan the money on the notes in good faith, acquiring them in the usual course of trade and without notice of Mansfield's fraud or want of authority to issue them?

The facts of this case present some extraordinary features, but the rights of the parties must be measured by the rules ordinarily applicable to partnerships and which control the power of a partner to borrow money and bind the firm.

The assignment of error first urged in appellant's brief complains of that part of the charge of the trial court which instructs the jury that there is no evidence of Mansfield's express authority to issue the notes sued on, and directing them to address their investigation to the question of implied authority resting upon the nature of the partnership for the benefit of which the notes purport to have been issued. In this we think the court committed no error. It is insisted that certain portions of Mansfield's evidence present the issue, but after a careful examination of his entire testimony we are of opinion that, considered in its entirety, it negatives the idea that he had express authority. The

matters to which he refers as clothing him with express authority culminated in the Fort Worth loan, and that loan relieved the exigency which rendered it necessary, and his testimony as to facts and circumstances occurring after his return from Fort Worth could, if it were true and not nullified by other statements of his, at most present the issue of implied power or estoppel. The financial statement of the affairs of the firm was made in view of the proposed Galveston or Houston loans, and had served its purpose when the Fort Worth loan was consummated.

The tenth assignment complains of a portion of the court's charge which it quotes as follows: "The nature of the business must have been such as made the frequent resort to borrowing a necessity for the advantageous prosecution of even a prosperous business, and which contemplated the periodical borrowing of money, regardless of any necessity for borrowing." The assignment does not accurately quote the portion of the charge assailed. The exact language used is here given: "For an implied power to exist in a partner to bind the firm by partnership notes, the business must be of a character which makes frequent resort to borrowing a necessity, not existing by reason of embarrassment or the happening of some fortuitous event, but for the advantageous prosecution of even a prosperous business."

The objection urged to this portion of the charge is that it erroneously defines the nature of a partnreship from which the right of a partner to borrow money and bind the firm may be implied. In Randall v. Meredith, 76 Texas, 669, Justice Stayton quotes with approval the following from Kimbro v. Bullitt, 22 Howard, 268: "Whenever the business, according to the usual mode of conducting it, imports in its nature the necessity of buying and selling, the firm is then properly regarded as a trading patnership, and is invested with all the powers and subject to all the obligations of that relation." Quoting from Bates' Law of Partnership, 327, he continues: "If the partnership contemplates to periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured state, it is a trading partnership, otherwise not." Justice Stayton adds: "If there are those not embraced within this definition in which each partner is clothed with power to borrow money, they may be recognized by the character of the business pursued, which makes frequent resort to borrowing a necessity, not existing by reason of embarrassment or on account of some fortuitous event, but for the advantageous prosecution of even a prosperous business."

The implied power is dependent not on whether the act be necessary, but on whether it be necessary to carry on the business in the usual way. Bates on Part., 320.

In giving the charge complained of the court evidently sought to apply the rules of an ordinary trading partnership to a firm engaged in the real estate or banking business, in order that the jury might determine whether the firm in question came within the definition

Neither banking nor buying and selling real estate on commission comes strictly within the definition of a trading partnership, and yet either may be so conducted as to clothe the partners with all the implied powers of members of a trading partnership.

In the case of Freeman v. Carpenter, 17 Wisconsin, 30, the court held that under the facts of that case the business of the defendant firm, consisting of a land agency and banking and money brokerage, carried with it the implied power of each partner to borrow money and bind the firm, but the court recognized the general rule for ascertaining what were trading partnerships, and used the following language: "All the authorities say that if the act of borrowing is necessary for the successful carrying on of the business of the firm, then the law implies an authority to do it. * * * If the note was executed for any thing for which the firm had use, or which from the nature of the company was necessary and usual to the successful prosecution of its operations, then it becomes a charge against the firm."

The portion of the charge quoted in the assignment does not even contain an entire sentence but is part of a lengthy paragraph, and should not be construed as standing alone. The entire paragraph 4 is lengthy and need not be set out here. Considered in its entirety, it furnished the jury with clear and sound rules for their control in determining the nature of the partnership and the existence of the implied power to borrow. The assignment is without merit.

Appellant insists that the firm of Mansfield & Root were engaged in the banking business, and that the nature of the banking business is such as to carry with it necessarily the implied power of the partners to borrow money.

We are not required to decide the question. The articles of the copartnership, of which W. B. Root and Mansfield were the successors, declared among other things that the banking partnership should be carried on under the firm name of the "Bank of Laporte," and the undisputed evidence is that the business of the banking partnership was invariably done under that name. In executing these notes Mansfield did not use the name of the banking firm, nor the names of the individual members of the banking firm, but used, both in signing and indorsing them, the name "Mansfield and Root," a name which had been sometimes used by the partners in the transaction of the business of the real estate firm, but never in the business of the bank.

It seems to be fairly well settled that in order for a partner to bind his firm by the issuance of commercial paper, in the absence of express authority, or some other fact fixing the firms liability, the paper must be executed in the firm name, or else in a name commonly used by the firm in transacting the firm's business. This rule is recognized in Freeman v. Carpenter, supra, and is laid down by Tiedeman in his work on Commercial Paper, sections 104, 105.

Here Masterson, if acting in good faith, dealt with a partnership whose firm name by the purport of the paper was "Mansfield & Root."

If any such firm existed at that time it was a real estate firm, and not a banking firm.

Masterson, in lending the money upon the notes in question, was chargeable with notice of the nature of the business in which the firm was engaged, and the note not being in fact executed for partnership purposes, but in fraud of the other partner, his right to recover in any event must depend on whether the nature of the business in which the firm of "Mansfield & Root" were engaged clothed each partner with the implied power to borrow money on the firm's name. The test is not in what enterprises the individuals H. P. Mansfield and W. B. Root were embarked, but in what was the firm in whose name the notes were given engaged?

According to appellant's contention, the jury by their verdict clearly indicated that they decided in favor of appellee Root upon the issue alone of implied power, that part of their verdict being in response to paragraph 4 in the latter part of the court's charge and in which that issue was clearly and correctly submitted. We are of opinion that the facts are sufficient to sustain their finding that no such power existed.

If it be true, as contended by appellant, that the jury found in favor of W. B. Root alone on the issue of want of implied power, then the complaints against other portions of the charge bearing on the question of notice, purchase in good faith, and as to the date of the purchase by Masterson, become immaterial, but we are of opinion that the assignments complaining that there was no evidence authorizing the submission of those issues are without merit. There were facts and circumstances in evidence which required their submission, and it would have been error on the part of the trial court to refuse to do so.

We deem it unnecessary to notice at length any of the other assignments. They present no reversible error, and the judgment will be affirmed.

Affirmed.

ON MOTION FOR REHEARING AND TO CORRECT FINDINGS OF FACT.

GILL, ASSOCIATE JUSTICE.—We have carefully considered the motion for rehearing, and in connection therewith have again examined the record. We have found no reason to change our opinion as to the proper disposition of the appeal.

Appellant complains among other things of our finding that it was shown without dispute that all the business of the bank was done in the firm name of the "Bank of Laporte," and directs our attention to the testimony of the witnesses Heyne and Moody and to the checks, notes, etc., in evidence. The testimony of both Moody and Heyne sustains the finding. The checks, notes, etc., are headed "Bank of Laporte, Mansfield & Root," and are signed either Bank of Laporte, Mansfield & Root, or by one or the other of the owners as cashier or assistant cashier. The articles of copartnership provide that the business of the bank be

conducted under the firm name of the "Bank of Laporte." We have simply held that the addition of the names of the owners of the bank did not change the legal effect of the proof. Nor does the existence of an account in the name of Mansfield & Root on the books of the T. W. House Bank change the result. We have found the facts as we construe the record. Whether there is any evidence on an issue is a question of law, and our finding that there is none, without setting out the testimony itself, can not prejudice appellant's rights on writ of error to the Supreme Court. The same may be said of our other findings of which appellant complains. The record goes up on writ of error, and the Supreme Court, in disposing of the question, will not accept our finding, but will inspect the record. Were it otherwise, we would willingly and patiently set out the evidence upon which our findings of fact are based. It is well known, however, that this is neither usual nor necessary. We are of opinion that the motion should be overruled and it is so ordered.

Overruled.

Writ of error refused.

JANE M. HILLEN v. W. H. WILLIAMS.

Decided February 11, 1901.

1.—Verdict on Special Issues—Judgment Must Conform.

Where the facts of a case have been submitted to the jury upon special issues, the judgment of the court must conform to the verdict, and is but the legal conclusion arising from the facts found by the jury.

2.—Community Interest in Lands Exchanged.

Where the land in controversy was acquired through an exchange for it of other land in which plaintiff had an equitable community interest, and the jury so found, a judgment in defendant's favor for title to all the land in suit was not warranted.

3.—Same—Community Improvements.

Where an original community interest in the tract so given in exchange was enhanced by reason of improvements placed thereon by the community, the equitable community interest should be measured by such enhanced value of the land at the time it was exchanged for the tract in controversy.

4.—Trespass to Try Title—Equitable Interest May Be Offset.

Where plaintiff had acquired the legal title to the land in controversy by an exchange therefor of lands in which she had an equitable community interest, she was entitled to offset such equitable interest against an equitable claim of defendant to the land in suit.

5.—Community Property—Assertion of Widow's Claim in Administration—Estoppel.

Where land bought by the husband before marriage is, in the administration of his estate, set apart to the widow as a homestead, the fact that she presented no claim against the estate for an interest in the land by reason of community funds having been used to pay for it, and of improvements placed on it by the community, does not estop her from asserting her community claim against one acquiring the land from the heirs of the husband, nor render such claim res adjudicata.

Appeal from Rusk. Tried below before Hon. W. J. Graham.

Turner & Hendricks, for appellant.

John R. Arnold, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—This is an action of trespass to try title, brought by appellant to recover of appellee a tract of 150 acres of land described in the petition. The amended original petition upon which the cause of action was tried in the court below is in the usual form of petitions in actions of this kind; sets up title by limitation of three, five, and ten years, and contains an allegation of the rental value of the premises and a prayer for the recovery of rents.

Appellee's answer to this petition contains a special exception to the claim for rents set up in the petition, a general denial and plea of not guilty, and, in reply to plaintiff's claim of title by limitation, avers that plaintiff held any title and possession to said land which she might have in trust for the heirs of J. C. Dorsett, deceased, who are the vendors of defendant; that plaintiff had never denied the title of said heirs to said land, but in recognition of the same agreed and consented to the sale of the land by said heirs to defendant; also pleads the coverture of two of said heirs of said Dorsett, and avers that the remaining heir shared the possession of said land with the plaintiff during all the time plaintiff was in possession of same. The answer also contains a plea of improvements in good faith; avers that the land was obtained by plaintiff by an exchange of a 200-acre tract which was the separate property of J. C. Dorsett, deceased, who was the husband of the plaintiff at the time of his death, which 200-acre tract had been set apart to plaintiff in the administration of the estate of said Dorsett as homestead for herself and the minor heirs of said Dorsett, who are the vendors of defendant; that plaintiff had abandoned the possession of the land in controversy some time prior to the purchase by defendant, and had repeatedly declared to defendant and others that she did not own said land, but that same belonged to the children of said Dorsett, and that defendant was induced by said declarations to purchase said land.

To this answer plaintiff filed a supplemental petition, denying all of the averments of defendant, alleging that the 200 acres of land traded for the land in controversy was paid for with community funds of said Dorsett and herself, and that improvements to the value of $450 were placed upon said land with the funds of said community; that after the death of said Dorsett she and the children of said Dorsett occupied said 200 acres as a homestead for twenty years, and then traded same for the land in controversy in this suit, which land she has continuously occupied as her homestead since its conveyance to her in 1884, until she was wrongfully dispossessed by the defendant as alleged in her petition.

In answer to plaintiff's supplemental petition the defendant filed a

supplemental answer containing numerous exceptions, some of which will be noted later on in this opinion, also pleas of limitation of two, four, and ten years to plaintiff's claim for the value of the improvements placed on said 200-acre tract of land, and plea of estoppel and res adjudicata based on the failure of plaintiff to have any claim she might have held against the estate of said Dorsett allowed in the administration of said estate. The remaining averments in said supplemental answer are immaterial in the disposition of this appeal and need not be set out. The trial of the cause in the court below resulted in a judgment for plaintiff for her homestead estate in the land in controversy, and in favor of defendant for the title to all the land, from which judgment the plaintiff prosecutes this appeal.

The case was submitted to a jury in the court below upon special issues, and the first, second, fourth, and twelfth findings contained in the verdict of the jury are as follows: "(1) We find that the 200 acres of land was not the separate property of J. C. Dorsett. We find that J. C. Dorsett's separate interest was five-eighths, and that the community interest was three-eighths in and to said 200 acres of land. (2) We find that the enhanced value of the land by reason of the joint efforts and labor of J. C. Dorsett and wife at the time of the death of J. C. Dorsett was $450. (4) We find that the defendant Williams did not act in good faith in making improvements upon said land. (12) We find that, with the improvements put thereon by the defendant Williams, the annual rental value (of the land in controversy) was $45. The jury further found that the defendant was not misled by any statement of the plaintiff, but that he was informed before his purchase that she claimed and asserted her rights in the land.

Upon these findings of fact by the jury it was error for the court to render judgment for the defendant for the title to all of the land, and to refuse to give judgment for plaintiff for the rental value of the land for the time it was withheld from her possession and occupied by the defendant. If a trial court can render a judgment in any case contrary to the verdict of the jury to whom are submitted the issues fact, then the right of trial by jury is a mere farce. If the verdict of the jury is not sustained by the evidence, such verdict and the judgment rendered thereon should be set aside and a new trial granted, but where a jury have intervened in a case and the issues of facts have been submitted to them, the judgment of the court must conform to the verdict, and is but the legal conclusions arising from the facts found by the jury. Claiborne v. Farmer, 18 Texas, 79.

The evidence in this case shows that the 200 acres of land which was exchanged for the land in controversy was purchased by J. C. Dorsett before his marriage with the plaintiff, and was therefore the separate property of said Dorsett. If any portion of the purchase money for said land can be shown to have been paid with community funds of plaintiff and said Dorsett, said community estate was entitled to reimbursement for the amount so paid, and the same was a charge upon the land. The

community estate of said Dorsett and plaintiff also had an equitable interest in said land to the extent that the same was enhanced in value by improvements placed thereon by said community, but in this case this equitable interest should be measured by the enhanced value of the land by reason of such improvements at the time same was exchanged for the land in controversy. Rice v. Rice, 21 Texas, 66; Funk v. Winter, 66 Texas, 525; King v. Cleveland, 60 Texas, 275.

The appellant in this case having acquired the legal title to the land in controversy in 1884, and the claim of title asserted by appellee being only equitable, resulting from the alleged fact that the consideration for the land was paid by the vendors of appellee, and the facts showing that said consideration was other land in which appellant claimed equities, upon the familiar principle that he who seeks equity must do equity, appellant must be allowed to show the extent of her equity in said land and to offset same against appellee's equitable claim to the land in controversy.

The appellant was not required to have her equitable claim upon the 200-acre tract of land settled in the administration of the estate of her deceased husband, J. C. Dorsett, and the fact that an allowance for a year's support was made her in said administration, and the 200 acres of land set apart to her as a homestead, and no claim was presented by her to the administrator of said estate for her interest in the improvements placed upon said land or in the community funds which may have been used in its purchase, does not estop her from asserting such claim in this court, nor make the same res adjudicata.

If appellee put improvements on the land with knowledge of appellant's homestead rights and in violation of good faith, such improvements became a part of the realty and inured to the benefit of the homestead estate, and appellant would be entitled to recover rent for the premises as thus improved. There is no merit in appellee's contention that it was not proper for plaintiff to set up her homestead claim in the land sued for and her equities in the 200-acre tract traded for said land, in a supplemental petition. These facts were all pleaded in answer to facts set up in defendant's answer, and were properly presented in a supplemental petition. We are of opinion that the allegation of plaintiff's petition are sufficient to entitle her to recover rents for the land sued for.

Because the judgment of the court below does not conform to the verdict of the jury, the judgment will be reversed and this cause remanded for a new trial.

Reversed and remanded.

H. HENKE AND C. G. PILLOT v. WILLIAM STACY.

Decided February 16, 1901.

1.—Deed—Filling Blanks After Acknowledgment—Registry as Constructive Notice.

Where the description of the land in a deed was filled in by the grantor after he had duly acknowledged the instrument, and he then forwarded the deed to the grantee, who accepted it and placed it on record, not knowing that it was incomplete at the time of its acknowledgment, the conveyance was valid between the parties, and its registry imparted constructive notice of the rights of the grantee to third parties who subsequently acquired an interest in the property from and under the grantor.

2.—Same—Notarial Record—Description of Property Therein.

The statute requiring the notary to enter the facts of acknowledgment and a description of the land affected in a record kept for that purpose are directory only, and his failure to perform such duty invalidates neither the deed nor the certificate of acknowledgment.

3.—Acknowledgment—Certificate Conclusive Except in Cases of Fraud.

Where the certificate of acknowledgment is regular on its face, it can not be so impeached as to destroy the effect of the record of the instrument thereon except in cases of fraud.

Appeal from Liberty. Tried below before Hon. L. B. Hightower.

A. C. Bullitt, for plaintiffs in error.

Martin & Douglas and *M. D. Rayburn,* for defendant in error.

GILL, ASSOCIATE JUSTICE.—This suit was brought by defendant in error in the form of an action of trespass to try title, to recover of plaintiffs in error 492 acres of land situated in Liberty County, Texas. The trial below resulted in a judgment in favor of defendant in error, and that judgment is here assailed under appropriate assignments of error.

One S. Liken executed to plaintiffs in error a deed of trust upon the land in controversy and other lands to secure the payment of a debt due by him to them. The attorney who prepared the deed of trust did not have at hand an accurate description of the Woodbury tract, which comprised the land in question, so he forwarded same through plaintiffs in error to Liken, with the request that he (Liken) should insert the proper description, sign and acknowledge it and forward to Henke and Pillot. Liken signed and acknowledged the paper before a notary public, but did not insert the description of the Woodbury tract until after the instrument had been acknowledged and duly certified, and had passed from the notary's hands back to his. When the additional description had been inserted by Liken, he himself forwarded the paper by mail to Henke and Pillot, and they, having no knowledge or reason to believe that the description of the Woodbury tract had not been inserted prior to acknowledgment, accepted the deed of trust and placed it promptly of record in Liberty County, on the 9th day of April, 1895.

On January 30, 1895, Lucien Minor, as guardian of the Opperman

heirs, sued Liken for the land involved in this suit, asserting the superior title thereto to be in said heirs. Liken, being advised by his attorney that the title asserted by the Opperman heirs was superior to his, decided to end the litigation by payment to them of an agreed sum of money. The amount agreed on was $1400. Not being possessed of this sum, he represented the situation to Stacy, the defendant in error, and induced him to pay the $1400, and take a deed to himself from the Opperman heirs. These heirs were minors, and the guardianship of their estates was pending in Galveston County. To avoid the delay and expense involved in procuring a deed from the guardian, it was agreed between Stacy, Liken, and all concerned that the money should be paid and judgment rendered in favor of and in the name of Liken, but that Stacy should be the owner of the judgment and the land because of his payment of the money by which it should be procured. This was accordingly done. Stacy had no actual notice of the Henke and Pillot deed of trust, though at the date of the transaction the deed of trust had been placed of record. Stacy, relying upon the assurance of Liken that the land was unincumbered, did not examine the records. Henke and Pillot were not parties to the Opperman suit, and had no knowledge of these transactions until after they had foreclosed the deed of trust, as hereinafter shown.

Liken died in November, 1895, and one B. F. Cameron was appointed administrator of his estate. Upon application of Henke and Pillot the land was by the probate court ordered sold to satisfy their lien, and they became the purchasers at administrator's sale. This sale occurred on April 16, 1897, and same was duly approved and deed made to them by the administrator. On the date of the execution of the last named deed, this suit was instituted by Stacy, who, to sustain his allegation of title in himself, relies alone upon the transaction by which the judgment was procured in the case of the Opperman minors against Liken, and his want of notice, either actual or constructive, of the Henke and Pillot deed of trust.

Stacy contends that by reason of the fact that the description of the land in controversy was not inserted in the deed of trust until after its acknowledgment before a notary, its record was not constructive notice of its contents as affecting that land.

Henke and Pillot contend that, as the description of the land in controversy was inserted before it left the hands of Liken, the maker, and in such a way as to bind him, and as they were without knowledge of the time and manner of its insertion and without fault in the premises, the deed of trust and its record were in all respects valid and effective as constructive notice of its contents.

Thus is presented the question upon which the rights of the respective parties rest. The trial court held that if the description was inserted after acknowledgment, its record was not constructive notice, and this holding is assigned as error.

It seems to be conceded that the transaction by which the Opperman judgment was procured and the agreement that it should inure to the benefit of Stacy placed the equitable title to the land in him. Inasmuch as that judgment effectually vested in Stacy such title as the Opperman heirs had, the above concession is correct, at least to that extent, and as Liken induced Stacy to purchase the Opperman title, representing that it was superior to his, Liken, in a contest between him and Stacy, would perhaps have been estopped to assert that his title was in fact superior to the one purchased by Stacy.

But no evidence was adduced tending to establish the strength of the Opperman title, so this appeal must be disposed of on the theory that the title mortgaged to Henke and Pillot was paramount. The apparent title was therefore in the estate of Liken at the date of the administrator's sale for the satisfaction of the deed of trust, and if the record of the deed of trust was constructive notice, Henke and Pillot, having no notice of Stacy's claim at the date of foreclosure, acquired a perfect title through that proceeding, against which the secret interest of Stacy can not now be permitted to prevail.

Did the record of the deed of trust in question constitute constructive notice to Stacy? When the deed of trust was delivered to Henke and Pillot it contained the description, and was in all respects regular and ready for registration. It was presented to the county clerk in this condition, and he did no more than his duty in placing it of record. Had Stacy inspected the record, it would have advised him of the existence of the lien, and he would have discovered nothing upon the face of the record, nor indeed upon the face of the original instrument itself, to excite suspicion as to its validity. It was in fact valid and binding upon Liken, who executed it.

In determining the question at issue it is proper to treat the deed of trust as covering only the Woodbury tract, and as containing no description of any land at the time it was acknowledged.

We have been cited to but one authority bearing exactly upon the question, and that is from another State. In discussing registry as proof, Mr. Dembitz, in his work on Land Titles, uses the following language: "To make registry proof the following circumstances must concur. The instrument must be one which under the law is fit to be recorded. (2) It must bear on its face evidence that it was admitted to record upon a proper certificate of acknowledgment. * * * (3) It must have been entered * * * in the proper county."

Measured by this rule, and it is clearly sound, a certified copy of the record, the instrument in question being lost, would have been proof of its execution as against the grantor, and he would not be permitted to show, in order to defeat such proof, that the deed of trust did not contain the description when acknowledged. It is clear, therefore, that both the instrument and the record of it was valid as between the parties. To declare a different rule would impose upon purchasers the duty to look not alone to the deed and certificate of the officer, but to interrogate

the notary himself, in whatever land the notarial act may have been done, in order to ascertain whether the deed had undergone some material change since its acknowledgment and authentication. Even should this precaution be taken, the notary's assurance that the deed had undergone no change would be extra-official, and he might not answer truthfully. If third parties were permitted to question the truth of the certificate, with how much greater ease might they overthrow his oral representation? The statute requiring the notary to enter the facts and a description of the lands affected in a record kept for that purpose are directory only, and his failure to perform such duty would invalidate neither the deed nor the certificate of acknowledgment.

The line of cases holding that the acknowledgment by a married woman of a deed in which a blank was left for the subsequent insertion of the name of the grantee, is void as to her, base the holding upon a different principle, and mainly upon the rule that a feme covert can not authorize another to perfect her deed. See 1 Dembitz on Land Titles, 338; Drury v. Foster, 2 Wall., 24. In the case last cited, however, it is said: "Although it was at one time doubted whether parol authority was adequate to authorize an addition or alteration to a sealed instrument, the better opinion at this day is that the power is sufficient."

In Cribben v. Deal, 21 Oregon, 211, a firm made a deed of general assignment and duly acknowledged same, leaving a blank for the name of the assignee to be filled by a third party to whom the instrument was delivered. The blank was filled and the instrument duly placed of record. The deed was assailed by a subsequent attaching creditor, but the court, after an exhaustive review of the authorities, upheld the deed. In the authorities cited in that opinion the validity of the instruments themselves were involved, and the force of their registration was not directly up for decision, but it seems to us that the principle is much the same. Many of the decisions cited in Cribben v. Deal, supra, were rendered in States where the old common law rule as to sealed instruments still prevails, hence the filling of the blank must have been held to relate back to the sealing of the instrument. The doctrine of the power to authorize another to fill blanks in a deed after signature and acknowledgment has been carried even further in this State. Threadgill v. Butler, 60 Texas, 599; Ragsdale v. Robinson, 48 Texas, 379; Runge v. Schleicher, 21 S. W. Rep., 423.

Another view of the question involves the right of either a party or a stranger to the instrument to question the truth of the notarial certificate when, upon its face, it is in all respects sufficient and regular. In Hartley v. Frosh, 6 Texas, 208, Chief Justice Hemphill said: "It seems to me on principle and authority that the certificate (of the notary) must be conclusive of the facts herein stated, unless fraud or imposition is alleged." In Peterson v. Lowrey, 48 Texas, Chief Justice Roberts said: "Nor are we prepared to hold that a certificate regular on its face upon which an instrument has been recorded could be set aside as a nullity by proof of extraneous facts so as to prevent the record of the instrument

from being notice to subsequent purchasers. No authority has been cited or found to that effect."

In Pierce v. Fort, 60 Texas, 469, it is held not to be the duty of the grantee to see to it that the notary does his duty in taking the acknowledgment of a married woman his grantor. In Freiburg v. De Lamar, 7 Texas Civil Appeals, 263, the case of Hartley v. Frosh, supra, is cited as establishing the rule that recitals in a notary's certificate are conclusive, unless assailed for fraud. To the same effect is Davis v. Kennedy, 58 Texas, 516, and Webb v. Burney, 70 Texas, 323.

It thus appears that in this State even a married woman can not assail the acknowledgment except for fraud, and that a vendor acting in his own right who delivers to an innocent vendee a deed purporting on its face to have been regularly executed and acknowledged, can not thereafter question either its execution or acknowledgment, and that its record is good as against him. It has also been shown that the courts of this State have extended the doctrine permitting vendors to execute and acknowledge deeds with blanks to be thereafter filled.

In the case of Insurance Co. v. Corey, 135 New York, 326, the doctrine as to the binding force of a deed, prima facie valid and ready for registration, as affecting the grantor, is clearly announced, and it is declared with equal directness that the record of such an instrument will constitute constructive notice to the subsequent vendees of the grantor. In that case the acknowledgment was assailed for want of jurisdiction on the part of the notary.

We therefore conclude that the trial court erred in holding that the insertion of the description subsequent to the acknowledgment rendered its record inoperative as constructive notice. The cases cited by appellee do not appear to be in conflict with the conclusion reached.

Other assignments presenting minor questions require no extended notice at our hands. They are believed to present no error. For the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

SADIE COMAN v. A. F. LINCOLN.

Decided February 21, 1901.

1.—Appeal Bond from Justice to County Court—Condition.

Where an appeal bond from the justice to the county court, under Revised Statutes, article 1670, was conditioned that if the judgment of the latter court was against appellant, she would "perform its judgment, sentence, or decree," this was sufficient, being equivalent in legal effect to the statutory provision that the appellant shall "pay off and satisfy the judgment that may be rendered against him on such appeal."

2.—Same—Surplusage.

If the obligation in such bond to "pay all such damages as said court may award against her" rendered the condition of the bond more onerous than required by law, such additional obligation may be treated as surplusage, and will not vitiate the bond.

Appeal from the County Court of Harris. Tried below before Hon. E. H. Vasmer.

Brookman & Kahn, for appellant.

PLEASANTS, ASSOCIATE JUSTICE.—The appellee recovered a judgment in the Justice Court for precinct No. 1 of Harris County against the appellant for the sum $117.68. Appellant's motion for a new trial having been overruled, she gave notice of appeal to the County Court of said county, and in due time filed her appeal bond as required by the statute. The condition of said bond is, "that the said Sadie Coman shall prosecute her appeal with effect, and in case the judgment of the County Court of Harris County, Texas, shall be against her, that she shall perform its judgment, sentence or decree, and pay all such damages as said court may award against her." Appellee filed in said County Court a motion to dismiss said appeal because of the insufficiency of the appeal bond. The court below sustained said motion, and rendered a judgment dismissing the appeal, from which judgment this appeal is prosecuted.

The appeal bond, which was held insufficient by the court below, conformed to all of the requirements of article 1670 of the Revised Statutes, except that the condition of the bond was as before set out. We think that the condition of this bond, while not expressed in the exact language prescribed by said article 1670, is the same in legal effect as the condition prescribed in said article. When appellant and her sureties bound themselves to perform the judgment of the County Court in case said judgment should be against appellant, they thereby bound themselves to pay and satisfy such judgment, and in case the judgment of the County Court should be against appellant, said judgment could also be rendered against the sureties on said bond. The condition of this bond is in the exact language prescribed by the statute for a supersedeas bond from the district or county court to the Court of Appeals, the very object and purpose of which is to authorize the appellate court, in case the judgment of the court below is affirmed, to render judgment against the sureties upon said bond. The appeal bond from the Justice to the County Court being in substantial compliance with the statute, the court below erred in dismissing said appeal. If the obligation to pay damages rendered the condition of said bond more onerous than required by law, such additional obligation may be treated as surplusage, and will not vitiate the bond. Lee v. Stone, 1 White & W. Con. Cas., sec. 1277; Trial v. Lepore, Id., sec. 1275; Jones v. Langham, 29 Texas, 413; Landa v. Heerman, 85 Texas, 1.

The judgment of the court below will be reversed and this cause remanded for a new trial, and it is so ordered.

Reversed and remanded.

TEXAS & NEW ORLEANS RAILWAY COMPANY v. JOHN M. WHITE.

Decided February 23, 1901.

1.—Damages—Measure of, for Injury to Land—Market Value of Sand Taken.

Where defendant, in digging a pit on his own land, caused the land of plaintiff, containing valuable sand, to slide into the pit, and appropriated such sand to his own use, the measure of plaintiff's damages was the market value of the sand, and not the difference which was thereby made in the market value of plaintiff's tract.

2.—Evidence of Market Value—Incompetent Witness.

A witness is not qualified to testify as to the market value of sand where his testimony shows that he is only repeating the statement of another as to such value.

3.—Facts Not Sustaining Verdict as to Amount of Sand Taken.

See the opinion for facts held not to show as large an amount of sand taken as is allowed for in the verdict and judgment.

Appeal from Liberty. Tried below before Hon. L. B. Hightower.

Baker, Botts, Baker & Lovett and *Greer & Chester,* for appellant.

Stevens & Martin, for appellee.

GILL, ASSOCIATE JUSTICE.—This suit was brought by appellee against appellant for damages for the removal of sand and soil from land owned by appellee. A trial by jury resulted in a verdict and judgment for appellee for $200, from which the railway company has appealed.

It was shown that appellant owned a tract of land adjoining appellee's, and had, in using the soil and sand for its own and other purposes, dug a pit about 20 feet deep, and so near to appellee's land as to cause it to slide or cave into the pit. It was shown that the land thus taken from appellee's tract was of three kinds. Part of it was "moulding sand," scarce and valuable. This consisted of a strata about 2½ feet in depth. The surface was black sand, or soil of small value, and about one foot in thickness. The remainder was building sand. The black sand had no peculiar value. The moulding sand was worth about 32 cents per cubic yard as it lay, and the building sand about 16 cents per cubic yard. While it does not affirmatively appear from the record that the sand and soil which slid into appellant's pit were appropriated by appellant or those acting under its authority, such is the fair inference from the testimony.

Appellant complains that the true measure of damages is the difference between the value of appellee's tract of land just prior to and just after the alleged injury, and that the court erred in not so instructing the jury. We are of opinion that the assignment is without merit. We have been able to find no Texas case directly in point, but the question has been decided adversely to appellant's contention in Merriwether v.

Bell (Ky.), 58 Southwestern Reporter, 987; and a like rule is announced in Mueller v. Railway, 31 Missouri, 262. In May v. Yappen, 23 California, 306, it is held that the measure of damages for the wrongful taking of gold-bearing earth is its value at the time it is separated from the surrounding soil and becomes a chattel. To the same effect is Goller v. Fett, 30 California, 481.

In Forsyth v. Wells, it is held that the measure of damages for wrongfully taking coal from the land of another is the value of the coal in place and such damage to the land as the mining may have caused. In Railway v. Wallace, 74 Texas, 581, it was held by our Supreme Court that it is the right of the owner of land which has been damaged to have his damage measured by the extent of the injury to the land used for any lawful purpose to which he might appropriate it, or to which it was adapted.

Here, if the earth taken from appellee's land is indeed valuable for the purposes named, and the company, or some one in its stead, has in fact appropriated the sand so taken and secured the market value therefor, then to compel appellee to accept as compensation only the general damage thereby done to the entire tract would permit the appellant to profit by its wrong. We think it clear that the correct measure of damages in such case is laid down in the authorities cited, and that the trial court did not err in so charging the jury.

Appellant complains of the admission of the testimony of the witness Cameron as to the market value of the sand. We are of opinion that the admission of this testimony was error, for the reason that the witness did not qualify himself to speak as to the market value of the sand. His own statement showed that he was but repeating the statement of another.

Appellee claims that its admission, if error, was harmless, as the witness Delery testified to the same facts. If this were altogether true, perhaps under the facts of this case its admission would have been harmless, but their testimony is by no means identical. Cameron stated that he was informed that the moulding sand was worth $20 for 15 cubic yards Delery testified that its net market value was 32 cents. Indeed, the only testimony in the case from which its market value could be legally determined was that of Delery.

In this connection we may properly consider the complaint that the verdict and judgment are not supported by the evidence on the question of amount. The extent of the "cave" or "slide" is variously estimated by the witnesses, some placing it as high as 70 feet in length and 60 feet in width, with a depth varying from 5½ to 20 feet. Since the pit on appellant's land had a depth of only 20 feet, it is not possible that the depth of the pit on appellee's land could have been as much as that at any point. It is not claimed that appellant actually went upon appellee's land and removed sand, and the original sand pit was no nearer to plaintiff's land at the nearest point than five feet. None of plain-

tiff's witnesses undertake to give with any accuracy the average length and breadth and depth of the hole made by the "slide," but estimate its maximum length and breadth. The amount of sand lost to plaintiff is capable of exact and accurate ascertainment, and the engineer who actually measured the excavation places the amount lost at 675 cubic yards. This evidence is unassailed by any witness who claims to have found with any accuracy the amount lost. Those who testify to a greater amount have merely looked at the place and estimated its length, depth, and breadth. Not even plaintiff gives its average length and breadth, though he is the only witness on his side who claims to have measured it, nor does he give an estimate of the amount of sand lost to him.

His contention, therefore, that the verdict can be sustained by taking the highest estimate as to length, breadth and depth and basing a calculation thereon is not tenable, for the evidence of himself and his witnesses furnishes no reliable data upon which to base a calculation. No witness stated that the average width was 50, 60, or 70 feet, but the greatest width was variously placed at those figures. It was the duty of plaintiff, if he did not wish to rely on the engineer's estimate, to have furnished the jury with some reasonable basis by which to arrive at the amount of sand lost, and this he has failed to do. We have been unable by any reasonable estimate to place the quantity at the figures contended for by plaintiff. Nor is the record in such condition as to authorize us to require a remitter. While the estimates opposed to those made by the engineer are insufficient to authorize the verdict, they can not be wholly ignored by this court, and since the quantity of sand lost can be accurately ascertained, we are of opinion the judgment should be reversed and the cause remanded. No other questions are presented which require notice at our hands.

Reversed and remanded.

WALLER COUNTY v. KEET MCDADE, SR.

Decided February 22, 1901.

Counties—Contract—Condition Precedent—Costs.

Where certain county officers agreed with the county that if it would turn over to the county attorney for suit thereon all its outstanding county convict bonds, the county should not be taxed with any of the costs in the suits thereon, the retention by the county of a part of the bonds was a failure to perform a condition precedent to its right to exemption from liability for costs in suits on the bonds, and the measure of damages for such breach of the contract was not the amount of the further costs that would have accrued to the officers if suits had been brought on the bonds not turned over.

Appeal from the County Court of Waller. Tried below before Hon. R. E. Hannay.

A. C. Tompkins and *Keet McDade,* for appellant.

W. J. Poole, T. D. Pinckney, and *Lipscomb & Styles,* for appellee.

GARRETT, CHIEF JUSTICE.—This action was brought by the appellee to recover of the appellant costs incurred and accruing to the appellee as clerk of the district court in a number of suits brought by the appellant in the District Court of Waller County upon county convict bonds. An itemized statement of the costs of the appellee in the several cases was made out by him and presented to the Commissioners Court for allowance and payment, but the court refused to allow the account and rejected the same. Suit was thereupon brought by him against the county to recover the amount. There were in the hands of the county judge of Waller County a large number of bonds executed for the hire of county convicts under article 3746 of the Revised Statutes, which were due and unpaid on September 13, 1899; and on that date the Commissioners Court entered into an agreement with the appellee and the sheriff and county attorney, which was signed by the parties, the county judge acting for the county, and was entered of record on the minutes of the court, that said officers would "bring suit and do all work pertaining to the bringing of suits on all bonds known as convict bonds, and try to collect by execution or otherwise moneys that may be due on all said convict bonds of Waller County, Texas, free of charge as to the party of the first part, and the party of the second part will release and tax not the party of the first part any cost or tax that may arise in bringing said suits, if the party of the first part turn over and deliver to W. W. Crook all of said bonds known as convict bonds of Waller County that are now due for W. W. Crook to bring suit on same." W. W. Crook was the county attorney. About the same time the Commissioners Court made an order that the county judge turn over to the county attorney on October 15, 1899, all county convict bonds "upon which said county attorney is hereby ordered to proceed according to law to collect." There were in all about eighty-five of the bonds, and they were in the custody of the county judge. The county judge did not deliver any of the bonds to be sued on until November 11th, when he delivered forty-five of them to the county attorney, and on December 20th he delivered twenty of them, retaining in his hands the remainder, which were never delivered. The bonds were demanded and called for several times by the county attorney, and the county judge would promise to deliver them, but failed to do so. In December the county attorney appeared before the Commissioners Court and requested that all of the bonds be turned over to him. The court again ordered the county judge to turn them over for suit, which he promised to do. Appellee's account was for the costs in forty-nine cases. He recovered judgment for the full amount of the costs incurred in all of them.

Appellant admits the breach of the contract to turn over all the bonds for suit, but contends that appellee could only recover such dam-

ages as he had sustained by the breach, and that the measure of damages could not be more than the costs that would have accrued to the appellee if suits had been brought on the bonds which had not been turned over to the county attorney for suit, which would have been much less than the amount of the judgment in his favor. Upon breach of the bonds it was the duty of the county judge or Commissioners Court to cause suit to be brought on them. Rev. Stats., art. 3748. In the absence of an agreement to the contrary, the county would be liable to the officers of the court in case of suit on the bonds for the costs accruing therein as any other plaintiff would be. The officers agreed with the Commissioners Court that they would not hold the county responsible for costs, but look only to the defendants, if all the bonds were turned over to the county attorney for suit. This was a conditional agreement, and the right of the county to be exempt from liability for costs depended upon its compliance with the condition upon which the agreement was made. The appellee brought suit against the county for the costs that accrued to him in the cases, and the county seeks to defeat liability therefor by proof of an engagement that the appellee would not hold the county liable, and if there was a breach of the agreement by the county, that the appellee could only recover such damages as he may have sustained by the breach. But a proper construction of the agreement shows that it was purely conditional. Suppose that the county had never turned over any of the bonds for suit, would it be contended that the officers could have maintained an action for damages against it for its failure to do so? The officers proposed to the county that if all of the bonds were sued on, they would look only to the defendants for their costs. This proposition the Commissioners Court agreed to accept, but did not follow up the agreement by compliance. Entire performance on the part of the county was an essential feature of the agreement, and its failure to turn over all the bonds was the failure to perform a condition precedent to its right to be exempt from liability for the costs to any extent. 2. Pars. on Con., 525. We affirmed the judgment of the court below on a former day of this term without a written opnion, as it is the custom of this court not to write opinions in affirmed cases of which it has final jurisdiction, but in deference to the earnest and able contention of counsel for the appellant that our judgment was wrong, we have carefully re-examined the case, and as a result are still of the opinion that the affirmance was right. The motion for a rehearing will be overruled.

Motion Overruled. Judgment Affirmed.

GEORGE E. GATLING v. SAN AUGUSTINE COUNTY.

Decided February 28, 1901.

Bond to County for Convict Hire—Surety Signing Conditionally.

Where a bond for the hire of county convicts, duly executed to the county judge, was signed by appellant as surety on condition that he was not to become liable thereon unless it should be also signed by one K. as surety, and the county judge, knowing of such condition, accepted the bond without K.'s signature, appellant was not liable, the condition upon which he signed never having been fulfilled.

Appeal from San Augustine. Tried below before Hon. Tom C. Davis.

Davis & Davis, for appellant.

PLEASANTS, ASSOCIATE JUSTICE.—Appellee brought this suit to recover the amount due upon a convict hire bond executed by W. M. Hunt, George Gatling, and W. A. Wall, and payable to the county judge of San Augustine County.

The defendant Gatling answered that he signed the bond as surety for the said W. M. Hunt, the principal therein, upon condition that the said Hunt would procure the signature of L. H. Knght to said bond as cosurety with said defendant; and that said bond was signed in the presence of the county judge of San Augustine County by the said Hunt and the defendant, and said county judge was fully informed and fully understood the conditions upon which the defendant signed said bond; that after said bond was so signed it was left with the said county judge with the distinct understanding that defendant was not to become liable thereon and the same was not to be considered as delivered until it was signed by the said L. H. Knight; that said Hunt never procured the signature of said Knight to said bond, which fact was known to said county judge at the time he accepted and approved same.

The uncontradicted evidence in the case sustains the averments of defendant's answer. At the time the bond was signed by appellant he and W. M. Hunt, the principal in said bond, were in the county judge's office. The county judge, Leo Bierhalter, wrote the bond and handed it to Hunt, who signed it and requested appellant to sign as one of his sureties. Appellant agreed to do this on condition that he was not to become liable on said bond unless Hunt also secured the signature of L. H. Knight as a surety thereon. The county judge heard this agreement and understood the condtion upon which appellant signed the bond. Appellant left the office after signing the bond, and did not know until this suit was filed that said bond had been accepted and approved by said county judge without having the signature of the said Knight thereto.

We think it clear that under these facts the appellant never became liable on said bond. It was not a complete and binding obligation upon appellant when he left it in the possession of the county judge, and

could only become so under the condition upon which appellant signed it, when it was signed by L. H. Knight. This condition never having been fulfilled, the instrument was never executed and delivered in such manner as to bind appellant, and can not be enforced against him. Smith v. Doak, 3 Texas, 215; Manufacturing Co. v. Powell, 78 Texas, 53. The judgment of the court below will be reversed and judgment here rendered in favor of appellant, and it is so ordered.

Reversed and rendered.

SECOND DISTRICT, 1901.

NEW YORK LIFE INSURANCE COMPANY v. ELIZABETH ORLOPP, ADMINISTRATRIX.

Decided February 2, 1901.

1.—Life Insurance Policy—Statutes of Another State Governing.

Where a life insurance policy stipulates that it shall be construed and governed by the laws of another State, the statutes of such other State applicable thereto are to be treated as part of the written contract, and can not be waived by the parties.

2.—Same—Construction of Foreign Statute—Pleading and Evidence Requisite.

Where the statute of another State governing the contract has received any peculiar construction by the courts of such State which is relied on in the courts of the State, such construction must be pleaded and proved here like any other fact, and where this is not done, a refusal here to follow such construction is not violative of the provision of the Federal Constitution requiring full faith and credit to be given to the public acts, records, and judicial proceedings of each State.

3.—Same—Lapse of Renewed Policy—Notice Before Forfeiture.

Where a life policy, made subject to the laws of New York (which prohibit the forfeiture of a policy for nonpayment of a premium unless notice is given fifteen days before it is payable), was duly declared lapsed for failure to pay a premium, but was afterward reinstated on payment of a part of the premium and the giving of notes for the balance containing a provision that all benefits should be forfeited if the notes were not paid at maturity, this constituted a renewal of the policy, and the insurer could not, upon a failure to pay such notes at their maturity, declare the policy lapsed without having given to the insured the prior notice of the time when the notes fell due.

4.—Same—Statutory Penalty—Constitutional Law.

The provision of the Texas statute imposing a penalty of 12 per cent and the payment of attorney fees on life insurance companies for failure to pay a loss within the time specified in the policy, is not violative of the fourteenth amendment of the Federal Constitution as denying the equal protection of the law.

Appeal from Tarrant. Tried below before Hon. W. D. Harris.

West & Smith, for appellant.

Ross & McLean, H. M. Chapman, and *T. J. Powell,* for appellee.

HUNTER, ASSOCIATE JUSTICE.—This suit was brought by appellee as administratrix of the estate of Harry A. Orlopp, on the 14th day of December, 1898, to recover of appellant on two life insurance policies, one for $4000 and the other for $3000, both dated May 9, 1893, issued on the life of the said Harry A. Orlopp, and payable to his executors, administrators, or assigns upon the death of the insured, and for reasonable attorney's fees, and 12 per cent damages as provided in article 3071, Revised Statutes of Texas. The amount of premium on the first was $112, and that on the second was $84, due and payable on the 1st day of May of every year in advance, and it was stipulated in said policies that if said annual premiums were not paid by or before said day, said policies should lapse and become void, and all payments made thereon should be forfeited to the company. It was also stipulated that the said contracts, or policies, should be construed and governed by the laws of the State of New York. The first premiums were paid May 1, 1893, but the premiums due May 1, 1894, were not paid, and the policies, by reason thereof, under the terms of the contracts, lapsed and became void, the company having given the notices required by section 92 of chapter 690, Laws of New York, 1892. On August 7, 1894, Harry A. Orlopp applied to the company to reinstate his policies, paying to the company one-fourth of each premium, and executing his two notes for the balance, each due November 1, 1894, and furnishing a health certificate as required by the company. A renewal certificate was issued by the company and sent to its local agent at Forth Worth, where Orlopp resided, but was never delivered to Orlopp, for the reason, as the local agent testified, that it was the custom of the company not to deliver such certificates until the notes were paid. The company accepted the cash, notes and health certificate, and afterwards, at maturity, sent the notes to a bank in Fort Worth for collection on November 1, 1894, and they were presented to Orlopp, and their payment demanded on the day of their maturity, and Orlopp failed to pay them. On April 20, 1895, Orlopp wrote the secretary of the company in New York offering to pay the notes, and the secretary, on April 22, answered that it would be necessary to furnish another health certificate, and send check for amount of notes, $146, and $7.30 accumulated interest, before the policies could be reinstated. Orlopp refused to furnish another health certificate. He tendered and caused to be tendered the regular annual premiums for 1895, 1896, 1897 and 1898 on May 1 of each year, which were declined and returned by the company upon the ground that the policies were lapsed and void, and on June 22, 1898, Orlopp died. Proofs of death were waived by the company by refusing to furnish blank forms upon which to make such proofs, the policies requiring proofs to be made according to the company's forms.

The appellant company pleaded and proved the New York statute, setting it out in its answer, and claimed forfeiture of policies for failure to pay premium due May 1, 1894, and for failure to pay the notes; while plaintiff pleaded a reinstatement of the policies, and a failure on

the part of the company to give notice under the statute of the due date of the notes, etc. The appellant proved the statute as follows:

"NONFORFEITURE OF POLICY WITHOUT NOTICE.

"Sec. 92. No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly payments, unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premiums, interest, or installment, or portion thereof, due on said policies, the place where it should be paid, the person to whom it is payable, shall be mailed and addressed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premiums, at least fifteen days, and not more than forty-five days, prior to the day when the same is payable. The notice shall also state that unless said premium, interest, or installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premiums, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to a surrender value or paid-up policy, as in this chapter provided. If the payment demanded shall be made in the time limited therefor, it shall be taken in full compliance with the requirements in the policy in respect to the time of payment, and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

But it did not plead nor offer in evidence any decision of the courts of New York construing said statute; nor otherwise allege or offer to prove what construction had been given it by the courts of that State. The notes executed for part of the premiums due May 1, 1894, were in the following form:

"Pol. 535,985. "NEW YORK, May 1, 1894.

"Six months after date I promise to pay to the order of the New York Life Insurance Company sixty-three dollars, at City National Bank, Fort Worth, Texas, value received, with interest at the rate of five per cent per annum. This note is given in part payment of the premium due May 1, 1894, on the above policy, with the understanding that all claims to further insurance, and all benefits whatever, which full payment in cash of said premium would have secured, shall become

immediately void, and be forfeited to the New York Life Insurance Company if this note is not paid at maturity, except as otherwise provided in the policy itself.

"$63. (Signed) "H. A. ORLOPP."

The case was tried by the court without a jury, and judgment rendered for appellee for the full amount of the policies, less the amount due on the two notes, and less the premiums for 1895, 1896, 1897, and 1898, the court refusing to give judgment for the 12 per cent damages, on the ground that the said article of the Texas statute was in violation of the fourteenth amendment to the Constitution of the United States, and the appellant brings the case here for revision. The appellee has also filed a cross-assignment of error to the court's action in refusing to render judgment in her favor for the 12 per cent damages allowed by the Texas statute, the court having sustained a demurrer to the claim for damages and attorney's fees as claimed under said statute.

There are but two questions involved in this appeal. The first is raised by appellant, and is: Whether, under the provisions of the New York statute above quoted, it was necessary to give the insured notice when the notes fell due, in order to entitle it to declare the contracts forfeited? The other is raised on appellee's cross-assignment of error, and is: Whether article 3071 of our Revised Statutes, imposing a penalty of 12 per cent, and the payment of reasonable attorney's fees on life and health insurance companies doing business in this State, for failure to pay a loss, is in violation of the first section of the fourteenth amendment to the Constitution of the United States?

In determining the question raised by appellant, we are compelled to construe the New York statute quoted and declare the meaning of the contract, reading the statute as a part of it. To do this involves only the well-known rule which requires the courts to declare the legal effect of a written instrument put in evidence, because such statute becomes a part of the written contract, and must be construed as such, with these differences, however; (1) the requirements of such a statute can not be waived by the parties; and (2) the statute ought, perhaps, to receive the same construction by the courts of another State as is given to it by the courts of last resort in the State where it was enacted. This rule is based, it is said, upon that section of our Federal Constitution which declares that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." U. S. Const., art. 4, sec. 1. These "public acts, records, and judicial proceedings" of one State are facts to be alleged and proved in the courts of another State; and where any public act of a State has received any peculiar construction by the courts of that State which is relied on in the courts of another State, it is incumbent upon the party insisting upon such peculiar construction to plead and prove the same like any other fact. Lloyd v. Matthews, 155 U. S., 222, 39 L. Ed., 128; Chicago & A. R. Co.

v. Wiggins Ferry Co., 119 U. S., 616, 30 L. Ed., 519; Hanley v. Donoghue, 116 U. S., 1, 29 L. Ed., 535. So that, in this case, we are not only not required to look to the decisions of the courts of New York to ascertain how they have construed this statute, but we are not authorized to do so, for that would be deciding this question of fact upon evidence not in the record and not pleaded by the parties.

Appellant's counsel have read in argument to us and have cited in their briefs the opinion of the Court of Appeals of New York in the case of Conway v. Insurance Company, 140 New York, 79, and also the cases of Banholzer v. Insurance Company, 77 Northwestern Reporter, 295, and 78 Northwestern Reporter, 244, decided by the Supreme Court of Minnesota, following the decision in the New York case, both seeming to hold that where notice under that statute was given of the due date of the annual premium, etc., and a part of it is paid, and a note like the one in this case is given for the balance, no notice is necessary of the due date of the note before forfeiture may be declared by the company. But in the Minnesota case, as appears from the first decision, that learned court, it seems, would have decided the point the other way, that is, that such notice on the note *was* necessary, had it not considered the question settled by the New York case; and on motion for rehearing Mr. Justice Canty dissented, maintaining that that part of the New York case relating to notice was mere dicta, and said: "By every sound rule of interpretation, the letter of the statute of New York applies to a case where the time of payment of an installment of the premium has been extended, and, clearly, such a case is within the spirit of the statute, and notice should be given of the time when the installment, as thus extended, will fall due." In the report of the Banholzer case it does not appear affimatively that the pecular construction given the statute by the New York court was pleaded or proved, but we infer both, as the court felt bound to follow that decision, even against the views, it seems, of four out of five of its members, as indicated by Justice Mitchell in the original opinion.

We therefore decline to consider the New York case except as matter of argument, and, considered in that light, it is not satisfactory on the point involved. Indeed, the distinguished jurist who wrote the opinion seems to have based the decision of the case on another point, the authority of the agent to accept the note and extent the time of payment of the premium, holding that he had no such authority. It was not, therefore, necessary to decide whether notice of the due date of the void note was required, or whether the statute applied to such cases, and this question the learned judge did not discuss.

The renewal contract did not change the policies so as to constitute them contracts for term insurance and hence not subject to the statute. See Insurance Co. v. Smith, 41 S W. Rep., 680, and authorities there cited; Insurance Co. v. Statham, 93 U. S., 24, 23 L. Ed., 789.

We come, then, to consider the terms of the statute just as if they were literally printed in the policies, as we are required to consider and

construe any other written contract, except, as it was proved to be the statute law of New York, its provisions are mandatory and can not be waived by the contracting parties. See Insurance Co. v. Hill, 97 Fed. Rep., 263; Society v. Clements, 140 U. S., 226; Hicks v. Insurance Co., 60 Fed. Rep., 690. And we first conclude that the policies sued on lapsed, and all benefits thereunder were forfeited, on May 16, 1894, that being thirty days after the mailing of the notice to the insurer, which mailing the evidence shows to have been done on the 14th day of April, 1894. And we also conclude that the acceptance by the company of one-fourth of the May, 1894, premiums in cash, and the two notes due November 1, 1894, for the balance of said premiums, amounted in law to a reinstatement or renewal of the policies with an extension of the time of payment on three-fourths of the premiums to November 1, 1894. We can not escape the conclusion that these notes were given for a portion of the May, 1894, premiums, and if we are correct in this conclusion, the statute applies to this extended portion of the premiums the same as it did to the whole premiums before the notes were executed. The language is: "No life insurance corporation * * * shall declare forfeited or lapsed any policy hereafter issued or renewed, * * * nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premiums, interest, or installments, or any portion thereof, * * * unless" the notice prescribed therein is given "at least fifteen days, and not more than forty-five days, prior to the day when the same is payable," etc.

These policies were "renewed" policies, a portion of the premiums, by the terms of the renewal contract made in August, 1894, became due on November 1, 1894, and no notice of the due date, or that a forfeiture would ensue if payment was not made at maturity, was ever given on these "portions" of the premiums. Hence, no lapse of the policies or forfeitures followed the failure to pay the notes at maturity, and the tender of the amount due upon the notes, and of the succeeding annual premiums for the years 1895, 1896, 1897, and 1898, kept the policies alive and in full force until the death of the insured. The administratrix, therefore, was entitled to recover the full amount of the policies, less the unpaid premiums, as adjudged by the District Court.

This brings us to consider the cross-assignment of error, which is as follows: "The court erred in not rendering judgment for plaintiff and against defendant for 12 per cent statutory damages." The learned judge had sustained a special exception to the claim of plaintiff for the damages and reasonable attorney's fees allowed by article 3071 of our Revised Statutes in cases like this, and in his conclusions of law takes occasion to express his judicial views on the unconstitutionality of the article in question as follows:

"3. That the claim for attorney's fees and damages for the nonpayment of the policy is unconstitutional, and is an unreasonable and unconscionable penalty placed on an insurance company for daring to avail

itself of the privilege of litigating its rights, or what it conceives to be its rights, in the courts of the country. (Signed) W. D. Harris, Judge."

The statute under consideration is as follows: "In all cases where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss." The exception which his honor sustained urged that the article was in violation of the fourteenth amendment to the Constitution of the United States, and that is the contention of appellant's counsel here. The last clause of section 1 of said fourteenth amendment provides that: "No State shall deny to any person within its jurisdiction the equal protection of the laws."

This court, on April 25, 1894, in the case of Insurance Company v. Walden, 26 Southwestern Reporter, 1012, was the first to decide the constitutional question here presented in favor of the validity of the statute. The next decision was by our Supreme Court, on May 10, 1894, in the case of Insurance Company v. Chowning, 86 Texas, 654, where Justice Brown fully discusses the question, citing numerous Federal decisions bearing thereon, and upheld the validity of the statute. The question again came before this court January 30, 1897, in the case of Fidelity Company v. Allibone, 15 Texas Civil Appeals, 178, and this court again sustained the constitutionality of the statute, notwithstand- the decision of the Supreme Court of the United States in Railway v. Ellis, 17 Supreme Court Reporter, 255, denouncing a somewhat similar statute of Texas relating to railroads as being in violation of the said fourteenth amendment, was urged as authority for holding this statute void for the same reason. But Justice Stephens, speaking for the court, said: "A late decision of the Supreme Court of the United States [citing the Ellis case] construing a somewhat analogous statute of this State, and reversing the decision of our Supreme Court approving its validity, may be at variance with the cases just cited [the Walden and Chowning cases], but until it is expressly so held, either by our own Supreme Court or that of the United States, we will adhere to the decisions already made." A writ of error was denied by our Supreme Court in this case on April 29, 1897, when Chief Justice Gaines said: "As to the constitutional question, we agree with the Court of Civil Appeals in holding that it is distinguishable from that passed upon by the Supreme Court of the United States in Railway v. Ellis, 17 Supreme Court Reporter, 255." Fidelity Co. v. Allibone, 90 Texas, 660.

The same question was, on May 3, 1897, again decided by this court, in the case of Insurance Company v. Smith, 41 Southwestern Reporter, 680, the court being pro tempore composed of the Hon. W. P. McLean, the Hon. A. M. Carter and the writer,—Chief Justice Tarlton and Justice Stephens being disqualified,—when the validity of the statute

was again sustained in the original opinion, though, on motion for rehearing, the two special judges concluded, upon the authority of the Ellis case, to overrule their original opinion delivered by Special Judge Carter, and also to expressly overrule by name all the decisions of this court and of our Supreme Court above cited. The writer, however, dissented upon the ground that the statute in question was valid as being an enactment by the Legislature in the exercise of one of the reserved rights of the States, commonly called the police power of the States, insisting that the Legislature had the right to provide the terms upon which foreign corporations of that class might do business in this State, and that, being a valid exercise of such power and right, the statute formed a part of the contract of every life and health insurance company issued and made in Texas since the date of its enactment in 1874. 41 S. W. Rep., 687.

Thus stood the question until November 21, 1899, when it again arose in the Circuit Court of Appeals of the United States for the fifth circuit, sitting at New Orleans, in the case of Life Association v. Yoakum, 98 Federal Reporter, 251, where McCormick, circuit judge, speaking for the court, says: "The fourth assignment is that 'the court erred in rendering judgment for 12 per cent damages upon $5000, and also for $750 for attorney's fees, for the reason that such charges constitute a penalty upon the defendant for defending this litigation, and discriminate against it, and are consequently contrary to law and unconstitutional.'" He then takes up the history of the article in question as shown by the legislative enactments, and by the decisions of our Supreme Court and of this court on its constitutionality, and also enters into an extended review of the general character of life insurance companies and their manner of doing business, and refers to the very technical decision of our Supreme Court in the case of Fitzmaurice v. Insurance Company, 84 Texas, 61, and to the decision of one of our Courts of Civil Appeals in the case of Hutchinson v. Insurance Company, 39 Southwestern Reporter, 325, in which our Supreme Court refused a writ of error.

Mr. Circuit Judge McCormick, after a severe arraignment of such companies as to their manner of doing business, referring to the statute in question, concludes his able opinion as follows: "It does not discriminate against some and favor others, but, though limited in its application, does, within the sphere of its operation, affect alike all persons similarly situated. It seeks to subserve the general interest of the public. It must be sustained. Whatever may be the sound conclusion as to the unqualified validity of this Texas statute, we hold that the fourth assignment of error in this case is not well taken, on the ground that the State had the right to prescribe the terms upon which foreign corporations may do business there. 'Insurance companies established by charter from one State have no natural right to carry on business in any other State, and permission to do so is a privilege for which the payment of a substantial sum as license may be required.' Tied., Lim. Pol. Power, 281. As articles 3071 and 3072, Revised Statutes of Texas, were in force at

the time the Yoakum policy was written, these provisions were assented to by the contracting parties, and were written into the contract."

Without adopting Judge McCormick's nervous rhetoric as set out in his opinion in that case, we may derive instruction from the facts he recites, and thus more plainly see, as expressed in the dissenting opinion of the writer aforesaid: "That the Legislature of Texas, in the exercise of this great residium of power still left in the people of the State, had the right to enact the statute in question, discriminating against this character of business, and that good reasons, founded in sound State policy, existed therefor; and that, therefore, the statute is not in contravention of the fourteenth amendment to the Constitution of the United States, but is valid and binding as part of the contract sued on in this case, and that the appellee ought to recover the 12 per cent damages as prescribed by the statute the same as if it were written in the face of the policies."

The Supreme Court of the United States, in passing upon a somewhat analogous statute of Kansas, in April, 1899, declared the same doctrine. Railway v. Matthews, 174 U. S., 96, 43 L. Ed., 909. See also Railway v. Hume, 115 U. S., 572, 29 L. Ed., 463; Barbier v. Connolly, 113 U. S., 27, 28 L. Ed., 923.

It appears, therefore, that, with the exception of the special court aforesaid, every court, both State and Federal, which has had occasion to pass upon the validity and constitutionality of this statute, has, in a regular line of decisions running back to April, 1894, found it reasonable, constitutional, and valid, and has upheld it as a legitimate exercise of the legislative power of the State to regulate its own internal affairs.

The judgment of the District Court will therefore be reformed so as to give judgment in favor of appellee, in addition to her recovery on the policies, for 12 per cent on the amount of said judgment, to be added thereto; the whole to bear interest at the rate of 6 per cent per annum from February 10, 1900, the date of the District Court judgment herein. And the judgment thus reformed is affirmed.

Reformed and affirmed.

Writ of error refused.

Stephens, Associate Justice, did not sit in this case.

WILLIAM LAWRENCE v. TEXAS CENTRAL RAILWAY COMPANY.

Decided February 2, 1901.

1.—Fellow-Servant—Assumed Risk—Incompetency.

Where a servant who knows of the reckless character of a fellow-servant, or if his incompetency, whereby it becomes dangerous to work with him, assumes the risk of longer working with him, yet he is not bound to inquire as to the competency of a fellow-servant, but may assume that the master will put only safe and competent men to work him.

2.—Same—Application of Rule Limited.

The rule that, if the servant had equal facilities with the master for ascertaining the danger incident to the work, he is held to have assumed the risk, does not apply where the injury is caused by the incompetency or recklessness of a fellow-servant, but only where the physical surroundings make the danger as obvious to the servant as to the master. Following Railway v. Lempe, 59 Texas, 19.

3.—Same—Operating Cars.

The unloading of a car by section hands is not operating it within the meaning of the article of the statute making railway companies liable, as to employes engaged in operating its cars and trains, for injury to an employe occasioned through the negligence of a fellow-servant. Rev. Stats., art. 4560f.

Appeal from Erath. Tried below before Hon. Lee Young, Special Judge.

Wynne, McCart & Bowlin and *J. E. McCarty,* for appellant.

L. W. Campbell, for appellee.

HUNTER, ASSOCIATE JUSTICE.—Appellant was a section hand in the employ of appellee, when he, with his section gang, was ordered by the foreman to unload a car of cross ties which had been set out on a side track, it appearing to be a part of his duty as a section hand to perform this kind of service when so ordered. Flippen and another section hand were inside the car throwing out the cross ties, while appellant and another section hand were picking them up and bearing them a few feet away from the track and stacking them. Flippen had been working with appellant and the section gang for about three months, but, it seems, was considered a new man. Several times while unloading the car Flippen was cautioned to be careful, that he was liable to hurt some one; and while appellant and his companion were taking hold of a tie, Flippen threw off one on top of the one appellant had hold of, and it mashed or cut off his thumb. There was evidence tending to prove that Flippen was a reckless, careless, incompetent man, and by reason thereof a dangerous man to work with, and that the foreman of the section gang knew it, and this suit for damages was based upon that theory. The defense was that plaintiff, with full knowledge of the incompetency of Flippen, and the danger of working with him, remained in the service of the company and thereby assumed the risk of injury. Also, that the injury was caused by the act of a fellow-servant, and that defendant is not, by

reason thereof, liable. There is some evidence also in the record tending to prove that appellant, before the injury, knew of Flippen's incompetency, though he denies it.

On the trial of the cause the court, among other things, charged the jury as follows: "(8) A fellow-servant assumes all the risks ordinarily incident to the business in which he is engaged, and when he has equal facilities with the master or vice-principal, for ascertaining the danger incident to the labor in which he is engaged, he is held by the law to have assumed a risk incident to his employment. (9) Again, if the alleged fellow-servant, Jim Flippen, was in fact reckless, negligent, dangerous, and incompetent, and if plaintiff was injured by the negligence of said Flippen, yet if you find from the evidence that the plaintiff knew, or by the use of ordinary care could have known, the reckless, negligent, and incompetent character of said Flippen, then the plaintiff would not be entitled to recover, and you will find for the defendant."

The assignments to these charges must be sustained, and so also must be the fourth assignment. If a servant know of the reckless character of a fellow-servant, or of his incompetency whereby it becomes dangerous to work with him, he assumes the risk of longer working with him. He need not inquire or investigate as to the competency of any fellow-servant. He may rely upon the diligence of the master, and assume that he will not put him to work with an incompetent man, nor put an incompetent man to work with him. Hence it was error, as held in the cases below, to charge the jury that if "by the use of ordinary care the plaintiff could have known of Flippen's incompetency, he could not recover." Railway v. Crenshaw, 71 Texas, 340; Railway v. Johnson, 89 Texas, 519, 35 S. W. Rep., 1042; same case, 90 Texas, 304, 38 S. W. Rep., 520; Railway v. Hannig, 91 Texas, 351, 43 S. W. Rep., 508; Railway v. Eberhart, 91 Texas, 321, 34 S. W. Rep., 510.

What we have said here will also indicate the error in the charge, to the effect that, "If the servant had equal facilities with the master for ascertaining the danger incident to the labor in which he is engaged, he is held by the law to have assumed the risk of such danger." This rule, it seems, does not apply in cases like this, where the injury is alleged to have been caused by the incompetency or recklessness of a fellow-servant, but only to cases where the physical surroundings make the danger as obvious to the servant as to the master. Railway v. Lempe, 59 Texas, 19.

Appellant's counsel insist that the company is liable for the injury, although the section hands engaged in unloading the car were fellow-servants with him, because, it is insisted, they were, while unloading the car, engaged in the business of operating it within the meaning of article 4560f of the Revised Statutes. We think not. The unloading of a car by section hands is not operating it.

For the errors in the charge as above indicated, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

M. T. BRUCE ET AL. V. FIRST NATIONAL BANK OF WEATHERFORD ET AL.

Decided February 2, 1901.

1.—Jury Challenges—Parties—Intervener.

An intervener and a defendant whose interests are not adverse are, as to jury challenges, to be regarded as one party, and must share together the number of peremptory challenges allowed by the statute to a party, and the intervener is not entitled to have the court direct whom the defendant shall challenge.

2.—Same—Division of Challenges—Harmless Error.

Error of the court, if it was error, in refusing intervener's request to compel an equal division with defendant of the statutory number of challenges was harmless where recovery was properly had against intervener upon the state of the pleadings alone.

3.—Intervener—Pleadings—Answer Requisite.

An intervener ocupying, as against another intervener, the attitude of a defendant, must deny the allegations of the latter pleading an estoppel against him, or the latter will be entitled to recover; the rule of pleading between them being the same as between original plaintiffs and defendants.

4.—Statement of Facts.

An agreed statement of facts will be considered only with reference to the parties agreeing to it. Schneider v. Stephens, 60 Texas, 419, distinguished.

5.—Usury—Foreclosure of Lien—Harmless Error.

An appellant can not avail himself of errors in rulings on a defense by him of usury, or in allowing foreclosure of a lien, where no personal judgment was given on the notes in suit, and where it was rightly found that he did not own the property for which the notes were given and on which the lien was foreclosed.

6.—Promissory Note as Collateral—Defenses.

A charge is erroneous which states that a negotiable promissory note taken in due course of trade by indorsement before maturity is subject to all the defenses available to the original maker against the original holder when it is taken as collateral security for a pre-existing debt.

Appeal from Parker. Tried below before Hon. J. W. Patterson.

Martin & Flanary and *H. W. Kuteman,* for appellant M. T. Bruce.

A. H. Culwell, for appellant D. C. Bruce.

G. A. McCall, for appellee First National Bank.

A. T. Watts, for appellee J. Laing.

STEPHENS, ASSOCIATE JUSTICE.—This suit was instituted by the First National Bank of Weatherford, Texas, against M. T. Bruce upon two negotiable promissory notes, dated April 27, 1892, one for $1000, due one year after date, and the other for $5000, due two years after date, both signed by M. T. Bruce, and payable to the order of J. Laing, who indorsed them in blank. The bank also sought a foreclosure of the vendor's lien on certain improved lots in the town of Weatherford, conveyed by Laing to Bruce when the notes were executed. The transfer of

the notes from Laing to the bank was denied by Bruce, who specially pleaded that they had been paid off by him and surrendered to him by Laing, and that the bank subsequently obtained possession of them under circumstances rendering it a holder in bad faith, or, at least, that it took them after maturity and with notice that he had paid them. The petition of the bank was filed September 20, 1897, and the answer of Bruce April 13, 1898.

On April 18, 1900, after there had been a trial and an appeal to this court (55 Southwestern Reporter 126), D. C. Bruce, a son of M. T. Bruce, intervened, claiming to be the owner and in possession of the property upon which the bank sought to foreclose the lien, and alleging that he had purchased it upon the faith of representations made to him by M. T. Bruce and J. Laing to the effect that the bank did not own the notes sued on, and that the same did not represent a bona fide debt; that no debt was due to the bank from either Bruce or Laing; and charging collusion between Laing and the bank. On the same day Laing intervened, denying the allegations in D. C. Bruce's plea for intervention, admitting that he had pledged the notes sued on as collateral for what he still owed the bank, and alleging that they had been executed to enable him to use them as collateral under the following circumstances: That he made the deed to the lots in question, which were his own property, to M. T. Bruce with the understanding that they were to remain his property, and that Bruce was to reconvey them to him whenever he should return the notes sued on to Bruce, who agreed to allow him to thus use the notes as collateral, and that no money whatever was paid for the lots. Laing further alleged a dissolution of the partnership in the liquor business between him and M. T. Bruce about August 1, 1894, charging that first M. T. Bruce and then D. C. Bruce paid him rents on the property, and pleading an estoppel against D. C. Bruce as his tenant. His prayer was for the recovery of the property, subject to the lien of the bank.

The issues so made were submitted to the jury, upon whose verdict judgment was entered in favor of the bank for $2100, the amount of the principal debt still due the bank, with foreclosure of the lien on the lots, and in favor of Laing against M. T. and D. C. Bruce for the recovery of the lots, subject to the bank's lien. It was further decreed that no execution should be issued against M. T. Bruce for any balance that might remain unpaid after the sale of the lots under the order of sale. From this judgment both M. T. and D. C. Bruce have appealed.

Before the intervention of D. C. Bruce, M. T. Bruce filed an admission in writing of the bank's right to recover, except in so far as the same might be defeated by the defensive matter set up, "that is, the notes herein sued on were fully paid and discharged by defendant Bruce, and that plaintiff acquired possession of the same after maturity."

On the issue of payment thus tendered by M. T. Bruce the evidence was conflicting, but fully warranted the finding evidently made by the jury against him upon it. The evidence was also conflicting on the issue tendered by intervenor Laing's plea as to the circumstances under which

the notes declared on were executed and the nature of the transaction between him and M. T. Bruce, but likewise warranted the jury in finding the facts to be substantially as alleged in that plea. The date of the dissolution of the partnership between Bruce and Laing was not correctly given in the plea, as the evidence showed the true date to be July 31, 1892, but that was immaterial.

On the plea of estoppel against D. C. Bruce, the evidence warranted, if it did not require, a finding that he held possesion of the property as tenant of Laing, paying or promising to pay rents as such from 1894 or 1895 to 1897. It will be noted also that D. C. Bruce failed to deny, by any pleading filed in the case, these allegations made against him by Laing.

The statement of facts fails to show that D. C. Bruce had any interest in the property except as tenant, unless the following quotation therefrom shows it, which can hardly be claimed: "Intervener D. C. Bruce offered in evidence deed from M. T. Bruce to D. C. Bruce, dated January 15, 1898, Filed February, 5, 1900." We are thus left to conjecture as to what was conveyed by this deed.

The first error is assigned to the court's refusal to permit intervener Bruce in the selection of the jury, to make peremptory challenges, as shown by the bill of exceptions. He demanded a separate jury list for the purpose of himself making six peremptory challeges, without reference to the number made by M. T. Bruce, which was properly denied upon the ground that their interests were not adverse, but that both intervener Bruce and defendant Bruce were to be regarded as one party within the meaning of the jury law, and entitled together to only six peremptory challenges. Rev. Stats., art. 3212; Hargrove v. Vaughn, 82 Texas, 347; Shoe Co. v. Insurance Co., 8 Texas Civ. App., 227; Baum v. Sanger, 49 S. W. Rep., 650; 12 Enc. of Pl. and Prac., 483, et seq. He then demanded that the defendant Bruce be required, or that he, intervener, be permitted, to peremptorily challenge three of those offered as the panel to select from, giving their names, but the court declined to take any action upon his demand, stating that it was a matter for the parties to settle between themselves, and the jury impaneled to try the case included the three thus challenged. Whether the court erred in refusing to divide between defendant and intervener Bruce the six peremptory challenges allowed by statute to "each party to civil suit in district court," is to us the most troublesome question presented by this appeal, and one upon which we have been unable to reach a satisfactory conclusion. The statute has made no provision for a case like this, and it may be doubted whether the court should be required to go further than the statute has gone. However, there is much force and seeming fairness in the view expressed by Chief Justice Finley in one of the cases cited above that in case of disagreement the challenges should be equally divided. The bill of exceptions fails to show how many peremptory challenges were made by defendant Bruce, and is perhaps defective in not showing fully how this was, so as to clearly exclude the inference that

the intervener was not prejudiced by the court's action, involving as it probably did the exercise of discretion, in the absence of a statute regulating the matter.

But however this may be, we have come to the conclusion that if there was error in the action or nonaction complained of, it would not warrant us in reversing the judgment, because in no event under the pleadings and evidence was intervener Bruce entitled to hold the property sued for by Liang, who, as against him, showed an unquestioned right to recover. Caldwell County v. Harber, 68 Texas, 321. As to intervener Bruce, who was in possession of the property, intervener Laing, who sought to recover it from him, was plaintiff in the action, and as such made allegations against intervener Bruce, which, as before seen, not being denied, entitled him to recover. The statute, it is true, pleads a general denial for the plaintiff of matters set up in the answer of the defendant, but where the defendant fails to deny what is alleged against him by the plaintiff, all the material issuable facts so alleged are taken as confessed. Because the plaintiff becomes such by intervention does not alter the case. While he is intervener, he is also plaintiff, and the issues must be made and determined under the rules of pleading and evidence provided for the settlement of controversies between plaintiff and defendant. There was nothing in his plea already filed to excuse the failure of intervener Bruce to reply to the allegations made against him by Laing, for it contained no denial in any form of the alleged relation of landlord and tenant. The nearest approach to it was the allegation that he had become the owner of the property in controversy by purchase upon the faith of representations estopping Laing from claiming the property, but this he utterly failed to prove, so far as this record shows. In no sense then was intervener Bruce a plaintiff in the issues affecting him so as to avail himself of the statutory denial of the facts alleged in the plea of Laing treated as an answer, but he stood before the court and jury as an intervening defendant and that only, without any denial of the facts of estoppel which required him to yield possession to Laing.

One other feature of the record may be noticed in this connection. The statement of facts, which was approved as an agreed statement, was signed by counsel for the bank, and by counsel for M. T. Bruce and D. C. Bruce, but not by counsel for Laing, who have consequently filed a motion to strike it out. There seems to be good authority for holding that in such case the statement of facts will be considered only with reference to the rights of the parties agreeing to it. Henderson v. Morris, 55 Texas, 596; Blow v. Heirs of De La Garza, 42 Texas, 232. The case of Schneider v. Stephens, 60 Texas, 419, opinion by Judge Watts, is cited as being to the contrary, but in that case there were only two parties, one plaintiff and one defendant, and there could consequently have been no agreed statement of facts without the concurrence of both. It was accordingly held that, although only one had signed it, as the court approved it as an agreed statement, the presumption would be indulged that the other party also had agreed to it. However, it may be that this would

be no answer to the assignment if, under the issues made by the pleadings, the manner of selecting the jury complained of might have been prejudicial.

The next error is assigned to the court's refusal to permit defendant Bruce to prove that there was usury in the debt for which the notes sued on were held as collateral, and that, applying the payments which had been made upon that debt to the principal, nothing remained unpaid but usurious interest. We find no reversible error in this ruling, especially in view of the judgment that was rendered relieving him of any personal liability on the notes. Judgment had been obtained by the bank against Laing upon the original debt, the suit as to Bruce having been dismissed, and not only was the defense of usury not interposed by Laing in that case, but in his plea of intervention in this case he admits the validity of that debt and judgment. If, then, the property in controversy be the property of Laing, as found by the jury, and by the judgment appealed from Bruce goes scot free, we fail to see that he has any ground of complaint.

The third error is assigned to the court's refusal to give special charges 1, 2, and 3, but the appellee bank objects to our considering the assignment so made, and the authorities would perhaps require us to heed this objection, inasmuch as these several requested charges contain propositions apparently so diverse as not to admit of being grouped in one assignment. However, we find that in so far as they were correct and applicable (and even further), they were covered by the charge of the court. In two of them, the first and third, the erroneous proposition was embodied, that a negotiable promissory note taken in due course of trade by indorsement before maturity is subject to all defenses available to the original maker against the original holder where it is taken as collateral security for a pre-existing debt. See Tyson v. Swift, 16 Pet., 1, 10 L. Ed., 865, and a long line of cases following it both in and out of this State, including Brown v. Thompson, 79 Texas, 58. There seems to be authority also for holding, in the absence of statute, that accommodation paper, which the verdict establishes this was, may be safely taken as collateral even after its maturity, but we need not go that far in this case. Colebrooke Coll. Sec., 2 ed., secs. 31, 32, 34, 41. But see Rev. Stats., art. 307.

The fourth error is assigned upon the ground that Laing could not recover under his pleadings and the issues in the case; but this assignment evidently arises out of a misconception of the real nature of the transaction of April 27, 1892, between Bruce and Laing as alleged and proved by the latter, in pursuance of which the notes then executed became accommodation paper, with the lots as security, first to the holder of the notes, and then to Bruce as accommodation maker, while the title to the lots, though conveyed to Bruce, was understood to remain in Laing, subject to the lien of such holder and maker.

The fifth and last assignment complains of the verdict, but in view of the foregoing conclusions must be overruled.

What we have already said also sufficiently disposes of the fundamental proposition submitted in behalf of intervener Bruce, who came into the case voluntarily and failed to establish any title to the property in himself, or even to show such possession as to put Laing, the true owner, upon proof of his title. It mattered not, then, to him that the bank was given a foreclosure of its lien, the fundamental proposition submitted relating to that issue.

The judgment is therefore affirmed.

Affirmed.

Writ of error refused.

GERMAN-AMERICAN INSURANCE COMPANY v. S. S. EVANTS.

Decided February 9, 1901.

1.—Fire Insurance—Waiver of Forfeiture.

See the opinion for evidence sufficient to show a waiver, by the subsequent conduct of the insurance agent, of a claim by the company ot forfeiture of the policy by reason of the insured removing nis family from the building, in which his servant continued to sleep at night.

2.—Same—Vacancy of Premises.

Also, see evidence held by the Supreme Court, upon application for writ of error, to show that the building had not become vacant or unoccupied within the meaning of the contract of insurance.

Appeal from Cooke. Tried below before Hon. D. E. Barrett.

Ledbetter & Bledsoe and *Eldridge & Gardner,* for appellant.

Cruce & Cruce and *Potter & Potter,* for appellee.

HUNTER, ASSOCIATE JUSTICE.—This was an action filed on the 7th day of April, 1899, in the District Court of Cooke County, Texas, by the plaintiff, S. S. Evants, against the defendant, the German-American Insurance Company, upon a fire insurance policy to recover the sum of $1850. The property insured consisted of a dwelling house occupied by the plaintiff as his home at the time the policy was issued, and his household and kitchen furniture. The policy was issued at Marietta, I. T., September 15, 1898, and the fire which destroyed the house and property occurred on the 21st day of November, 1898.

One of the grounds upon which the company refused to pay the loss and defended the action was that, after the policy was issued, the plaintiff moved out of his dwelling, and left it vacant and unoccupied for more than ten days, in violation of the provisions of the policy. He moved with his family into the upper story of a stone building owned by him, situated about 400 yards from his residence, to stay there during the ensuing winter.

The trial judge charged the jury, in substance, that the plaintiff had forfeited his right to recover on the policy, but submitted to the jury the issue as to whether or not the defendant had waived its right to claim the forfeiture by certain negotiations and consultations which took place between the adjuster for the insurance company and the plaintiff. The trial resulted in a verdict in favor of the plaintiff for the full amount of the policy sued on and interest, and the insurance company has appealed.

The question presented by appellant is, whether the evidence warranted the court in submitting the issue of waiver of forfeiture to the jury. The evidence tended to establish the material allegations in the plaintiff's petition, and was sufficient to entitle the plaintiff to recover the full amount of the policy, unless the policy had been forfeited by reason of the plaintiff's removal from the premises and vacating the same for more than ten days, and the forfeiture had not been waived.

The facts on this issue are briefly these: The plaintiff and his family, at the time the policy was issued, in September, 1898, occupied the premises as a residence—a home. They had a negro man-servant who occupied a servant's house in the back yard. The family left the premises about the first of November, and moved into rooms over the plaintiff's stone storehouse, about 400 yards from the insured home, for the purpose of remaining there during the winter months, as the stone building was warmer than the wooden house insured. They left nearly all their household furniture in the insured house, and had the negro servant to stay and sleep in a side room which was part of the house. After the family had been moved into the stone storehouse for more than ten days, the insured house was burned down, and the household goods almost totally destroyed by fire.

The property insured was situated at Marietta, I. T., and the contract of insurance was made there. The policy contained the following stipulations: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the hazard be increased by any means within the knowledge or control of the assured; * * * or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to the company, protect the property from further damage forthwith, separate the damaged from the undamaged property, put it in the best possible order and make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; * * * and shall furnish, if required, verified plans and specifications of any building.

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this

policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any provision, privilege, or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The fire occurred November 21, 1898. On the 23d of the same month the appellant's adjuster arrived at Marietta and began an investigation of the extent of the loss. Before beginning his investigation, however, he endeavored to get appellee to sign a printed form of agreement in which it was stipulated that appellant company waived no rights of the company under the policy by reason of the investigation, but appellee refused to sign it, informing the adjuster, however, of the fact that he and his family had moved from the premises into the stone building more than ten days before the fire, but had left the negro in the house, giving him a true and full statement of all the facts upon which the forfeiture was afterwards and is now claimed. The adjuster, upon failing to get the appellee to sign this agreement, announced to appellee and called on others present to witness that he would make the investigation as to the extent of the loss, but that in doing so he desired it distinctly understood that he did not and would not waive any of the conditions of the policy, or rights of his company to which it might be entitled thereunder, and then proceeded in company with appellee to investigate the loss. He requested appellee to make out a list of the personal property destroyed, together with a list of that saved, which appellee did by two or three hours' work. He and appellee went upon the site of the burned building, and he took the dimensions of the building, and requested appellee to meet him at the hotel after supper, which he did; and they then and there discussed the loss, and the adjuster offered to settle it at $1020, which offer appellee declined to accept, and the adjuster left, having never claimed that the policy had been forfeited by reason of the removal, nor for any other reason.

Some ten or fifteen days after the adjuster left Marietta, not having heard from him nor the company, the appellee employed lawyers to make out his proofs of loss, as required by the policy, and on the 15th day of December, 1898, forwarded them by mail to the appellant company at New York, claiming the full amount of $1850. The company received this letter and answered it, notifying appellee that the matter was referred to Mr. Drumm, the adjuster aforesaid, "who had charge of the company's losses in the Indian Territory." Mr. Drumm received the papers referred to him, and also wrote appellee's attorneys that he would call on them soon in reference to the matter, but in none of these letters did the company or the adjuster claim a forfeiture of the policy.

If this temporary absence of the family from the dwelling-house, with a servant left in charge, can be held to be a vacancy within the meaning of the contract, which it is not necessary now to decide—but see Insur-

ance Co. v. Kempner, 12 Texas Civ. App., 533, and 89 Texas, 652; Herman v. Insurance Co. (Iowa), 51 N. W. Rep., 355; Hill v. Insurance Co. (Mich.), 58 N. W. Rep., 355; May on Ins., sec. 249; 2 Beach on Ins., sec. 721; Bryan v. Insurance Co., 8 W. Va., 605; Insurance Co. v. Smith, 3 Colo., 422; Harrington v. Insurance Co., 124 Mass., 126; Woodruff v. Insurance Co., 83 N. Y., 133; Cummins v. Insurance Co., 67 N. Y., 260—this evidence required the court to submit the issue to the jury whether the forfeiture had been waived by appellant, and was sufficient to warrant the jury in finding that it had been so waived.

The acts of the adjuster, after being fully informed of the facts upon which the claim of forfeiture is now predicated, authorized the jury to conclude that he did not claim a forfeiture, but elected to go on with his investigation of the amount of the loss. He required appellee to make out at some labor and trouble a list of the property lost and a list of what he had estimated the loss to be, as the facts authorize us to conclude; left without claiming any forfeiture; allowed appellee to go to the expense and trouble of employing lawyers and of making out his proofs of loss, at no time up to this period claiming the forfeiture. The acts are inconsistent with a claim of forfeiture. At that time the policy was either valid or void, and if the adjuster had intended to claim a forfeiture he should have done so promptly, and not required the appellee to do things which could only be required of him under the contract, thus treating it as still valid and binding. His conduct was such as to leave the appellee under the belief that no forfeiture would be claimed, and he was thus induced to incur expense and perform labor in complying with the terms and stipulations of the policy, which he was not required to do if liability under the policy had been denied. Insurance Co. v. Loyd (Ark.), 56 S. W. Rep., 44; Insurance Co. v. Gibson, 53 Ark., 494; Insurance Co. v. O'Neal, 14 Texas Civ. App., 516; Insurance Co. v. Munger, 49 S. W. Rep., 271; Insurance Co. v. Moriarty, 37 S. W. Rep., 628; Insurance Co. v. Eggleston, 96 U. S., 572, 24 L. Ed., 841; Insurance Co. v. Kuhlman, 78 N. W. Rep., 936; Kingman v. Insurance Co., 32 S. E. Rep., 762.

But it is insisted that the adjuster declared to appellee that his conduct and conversation and offers of compromise must not be taken as a waiver of any of the rights of the company under the stipulation in the policy. The answer to this is, appellee refused to agree to such proposition. This refusal to agree was tantamount to saying to the adjuster: "You know the law and the facts, and you must either treat the policy as void or as valid; you can not do both and you know it—now take your choice;" and he chose to treat it as valid by requiring the appellee to perform such stipulations as were binding upon the insured. This must be treated as an election to waive the forfeiture and hold the policy valid, notwithstanding he declared at the time he was not waiving it.

The adjuster in this case is to be commended for his efforts to avail

himself and his company of both horns of the dilemma, and his faithful struggle to that end reminds us not a little of Byron's description of how Julia did it under an equally pressing emergency:

> "A little still she strove, and much repented,
> And whispering 'I will ne'er consent'—consented."

His acts were totally inconsistent with his declarations, and in the common affairs of men they say: "Actions speak louder than words," and sometimes the law takes the same sensible view of the proposition.

We find no error in the judgment or proceedings prejudicial to the appellant, and order that the judgment be affirmed.

Affirmed.

Writ of error refused by the Supreme Court upon the ground that the evidence showed that the house did not become vacant or unoccupied within the meaning of the contract of insurance—pretermitting the question of waiver.

FORT WORTH & DENVER CITY RAILWAY COMPANY v. H. M. GILSTRAP.

Decided February 16, 1901.

1.—Railroads—Negligence—Injury to Section Hand—Charge.

In an action for personal injury to a railroad track repairer, injured by a passing train, it was error for the court to charge that plaintiff should recover if he was injured by the negligence of an acting foreman in not taking proper steps to notify him of passing trains in time to clear the track, where the evidence showed that plaintiff knew that no steps had been taken to warn him and his colaborers of approaching trains, and that he heard the approaching train in time to have cleared the track and escaped the danger.

2.—Same—Pleading and Charge—Negligence Not Alleged.

An allegation that plaintiff's injury was caused by the negligence of his foreman in directing his gang to work on the track without making arrangements to notify them of approaching trains in time to clear the track, did not warrant a charge that if plaintiff was injured by his foreman's negligence in leaving no one in control of plaintiff and his colaborers during his absence from them, plaintiff could recover.

3.—Same—Issue Not Submitted to Jury.

Error in the charge authorizing a recovery by plaintiff, a section hand, can not be held immaterial on the ground that such recovery was warranted by the fact that he was injured in an effort to save life and property by removing a car and timbers from the track—such removal being necessary and plaintiff acting without rashness—where such an issue was not submitted to the jury.

Appeal from Wise. Tried below before Hon. J. W. Patterson.

Stanley, Spoonts & Thompson, for appellant.

R. E. Carswell and *Booth & Morton,* for appellee.

CONNER, CHIEF JUSTICE.—H. M. Gilstrap, appellee, September 16, 1899, filed his original petition, and on May 31, 1900, his amended petition asking for damages in the sum of $15,000 for personal injuries received by him August 12, 1899, while in the employ of defendant as a bridge and track repairer. He was a member of a gang of five men engaged in pushing a small pushcar loaded with heavy timbers along the main track of the railway, when he heard the whistle of an approaching freight train, then out of view and runnng at a high rate of speed. In obedience to the order of John Wales, a fellow-workman, alleged to have been left in charge of the gang by Chase, the regular foreman, he continued to push said car further along the track and to unload the same and clear the track of said car and load. Plaintiff alleged that the train was approaching rapidly, and if the cars and timber had not been removed the train would have been derailed and great loss of life and destruction of property would have resulted. That plaintiff knew this, and stuck to his duty till the timbers and cars were removed, when he, in attempting to escape from the approaching engine, was struck by one of the timbers and injured, and that he was without negligence.

He alleged that said accident, and consequent injuries, was occasioned: "(1) By the negligence of defendant (appellant) in failing to furnish said bridge gang with enough men to enable the foreman to put out guards to stop approaching trains and enable the gang to clear the track for their passage. (2) The negligence of the foreman, Case, in charge of said gang, in directing it to proceed to such work without making arrangements to notify it of the approach of trains in time to enable it to clear the track for their passage. (3) The negligence of acting foreman Wales in proceeding with said work and setting plaintiff to the same without taking proper steps to apprise him of the approach of trains in time to enable the track to be cleared for their passage. (4) The negligence of defendant and its employes in charge of said train and its tracks in failing to apprise plaintiff and said bridge gang of the approach of said train in time to enable them to clear said track without danger to themselves. That said train was running out of its schedule time to pass the point where the gang was at work. That it was scheduled to pass at 11 p. m., and in fact passed the next morning at 7. That plaintiff was not aware that it had not passed, or that any train was due, and was himself exercising due care."

Appellant answered by general demurrer, general denial, contributory negligence of plaintiff, and that if there was any negligence, it was that of plaintiff's fellow-servants and company employes, for whose negligence defendant was not liable, and that the injuries were the results of risks assumed by plaintiff in entering and remaining in the service of defendant and ordinarily incident and arising out of the work he was engaged to perform, and if there were any dangers attendant upon the manner of doing said work, or in any other matter alleged, the danger was patent, open, visible, and known to plaintiff, who, with

such knowledge, continued in the service, and thereby assumed all dangers resulting from the alleged grounds of negligence.

There was a jury trial resulting in a verdict and judgment for appellee in the sum of $3000, from which this appeal has been prosecuted.

The evidence shows that on the day alleged appellee was in the employ of the appellant railway company as one of a gang of seven men engaged in building and repairing bridges; that one A. S. Case was foreman of the gang, with power to control and direct the men; that on August 11th Case took two of the men and went to another point to put up some bridge signals, leaving five of the men at work at the place of the injury. Before leaving, Case gave directions what to do during his absence to Wales, one of the gang. The evidence was conflicting as to whether Wales was appointed by Case (as it seems Case was empowered to do) to assume control and direction, but whether so or not, there was evidence tending to show that Wales did so assume control, and that on the next morning the gang loaded four heavy bridge timbers, 12x12 inches and 14 feet long, on a small pushcar, and were pushing it along the main track toward a point where such timbers were to be used. While it was so engaged, and when within about ten feet of a bridge about 100 feet long on the route they were going, they heard the whistle of a freight train approaching at a speed of twenty or twenty-five miles an hour. The train was then out of view around a curve several hundred yards. No flagman had been stationed nor had other means been employed to warn approaching trains of obstructions on the track. Appellee testified that had they at once begun to unload the timbers and remove the pushcar, as he then suggested should be done, there would have been plenty of time to have done so without injury, but that Wales ordered one of the men to go back and flag the train and the remainder to push the car along and over said bridge, which was accordingly done, whereupon appellee and others hastily removed the car and timbers from the track; not in time, however, to avoid the train coming in contact with one of the timbers, by reason of which, as the evidence tends to show, appellee was injured as alleged.

The court submitted but two grounds of recovery. In its main charge was given definitions of negligence, ordinary care, fellow-servants, charges upon assumed risks, contributory negligence, and submitted the following instruction as a ground of appellee's recovery: "(2). If you find and believe from the evidence that at the time of the plaintiff's injury (if he received any injury), that John Wales was acting as foreman, and if you believe the said Wales had been intrusted by the defendant company with the authority of superintendence, control, or command of plaintiff, and his colaborers, or had been intrusted with authority to direct plaintiff and his colaborers in the performance of any duty, and if you believe the said Wales had received such authority from A. S. Case, the regular foreman of the defendant's bridge gang, and if you further believe from the evidence that the said Wales, while acting as such foreman, directed the defendant and others working

with him to proceed with the work they were then engaged in, without taking proper steps to notify the plaintiff and his colaborers of approaching trains in time to enable the track to be cleared in time for their passage, and if you believe such failure to take steps to so notify the plaintiff and his colaborers was negligence on the part of the said Wales, and that the plaintiff, by reason thereof, was hurt and injured as charged in his petition, and if you believe the plaintiff himself was not guilty of negligence that caused or contributed to his injury—you will find for the plaintiff such damages as you believe he has sustained by reason of such hurt and injury."

Upon request of appellee the court also gave the following special instruction, to wit: "Gentlemen of the Jury: You are instructed that if you believe from the evidence that A. S. Case, the defendant's regular foreman, was absent at the time the plaintiff received his injuries, if any, and that he failed to leave any one in control of plaintiff and his colaborers, and that John Wales assumed control of the men, and that it was negligence in said Case to leave said men without some one to guide and control and protect them, and that plaintiff was injured by the negligence of said Wales concurring with the negligence of said Case, and that plaintiff was not guilty of contributory negligence which caused or contributed to his injury, then you will find for the plaintiff."

These charges are assailed in the twelfth and seventeenth assignments, and we are of opinion that both assignments must be sustained. In our judgment the evidence did not warrant the submission of the issue presented in the second paragraph of the court's main charge, and appellee's petition did not support the issue presented in the special charge quoted.

The evidence failed to show negligence on the part of those operating the freight train mentioned, and no such issue was submitted. If it be assumed that there was negligence under the circumstances in failing to have out flagmen or danger signals to warn approaching trains, and that the proof thereof supported the charge of negligence in failing to "take proper steps to notify plaintiff and his colaborers of approaching trains in time to enable the track to be cleared," * * * nevertheless the evidence is undisputed that appellee knew that no such steps had been taken, and he expressly states that he heard the approaching train in time to have cleared the track and escaped all danger. He testified: "I knew on this occasion that no flag had been put out, and that no flagmen had been stationed to warn approaching trains, and knew that a train was liable to come from either direction at any minute. * * * We did not unload it (the pushcar) when we first heard the train, because Mr. Wales told us to push up to the other end of the bridge. * * * I first heard the train whistle some distance away, and then it whistled again just before it got to us, I should say the other side of Cowan switch (about 200 yards). * * * I asked Wales if we had not better throw the car off before we got to the bridge, and he said no, to put it across the bridge. If we had put the car off where we were when we

first heard the train whistle, we could have done it very easily, and no one would have been hurt. * * * Two of us jerked the car off as far from the track as we could. Ward and White had quit us. If they had stuck to their post, I think we would have got every thing off all right."

In view of this evidence, the issue submitted in the main charge was immaterial. Not only so, but with full knowledge of the facts relied upon as constituting the negligence charged, and with notice of the approaching train in ample time to have avoided all injury, appellee had no right of recovery on this ground, and the charge to the contrary was erroneous. We think a consideration of the record makes it equally apparent that the special charge quoted should not have been given. It is not pretended that appellee's petition in direct terms charges "negligence in said Case to leave said men without some one to guide and control and protect them." Appellee, however, cites the second ground of negligence charged by him as hereinbefore quoted, and insists in argument that: "The charge that Case put the men to work without making arrangements to notify them of the approach of trains in time to enable them to clear the track, embraces the charge that he did not put some person in charge of the men with directions to so order the work that passing trains would not be subjected to danger of wreck."

We think this contention hardly maintainable, particularly in view of the allegations of appellee's petition. Early in the recitation of the wrongs charged, he alleges: "That on the 13th day of August, 1899, said foreman (Case) was away on other business, but before leaving said gang directed them fully as to their work for said day, what they should do and how they were to proceed about it, and constituted and appointed one John Wales, one of said gang, as foreman during his absence, and directed the members of the same to work for that day under his direction and superintendance. * * * That at 7 o'clock on the morning of August 12, 1899, said gang, including plaintiff, according to the instructions of the foreman, Case, and under the direction and superintendance of said Wales, went about its days work." The negligence of Wales, as acting foreman, in failing to take the proper steps to notify appellee of approaching trains is made the third ground upon which appellee seeks a recovery; and his theory of the case generally, both in the pleading and evidence, is that Wales was the authorized acting foreman of the gang at the time of the accident. We therefore conclude, if in any event such negligence on the part of Case could be considered as a proximate cause of appellee's injuries, that the court committed errer as assigned because of appellee's failure to plead the ground of negligence therein submitted.

Appellee also insists in effect that the errors, if any, in the charges of the court are immaterial, on the ground that appellee is to be protected in an effort to save life and property by removing the pushcar and timbers from the track, if he acted without rashness, and it appeared reasonably necessary to do so; citing Railway v. Longerdorf, 13 Law.

Rep. Ann., 190; Eckhart v. Railway, 43 N. Y., 502, et seq.; Shearm. & Redf. on Neg., sec. 186, and other authorities. While there was evidence tending to show that a failure to remove the car and timbers might have caused the wreck of the freight train, and consequent loss of property and perhaps of life, yet no such ground of recovery was submitted, if raised by the pleadings; and we think it evident from what has been stated that the proposition, if maintainable—which we do not consider it now necessary to discuss—is so involved with other issues raised by the evidence as to require its submission to the jury under appropriate instructions.

For the errors in the charge of the court discussed the judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

MONTGOMERY BAGGS v. H. C. HALE.

Decided February 23, 1901.

1.—Judgment—Settlement of, Obtained by Fraud—Setting Aside—Evidence.

A settlement by defendant of certain California judgments against him for much less than their face will not be set aside on the ground that it was obtained through his fraudulent representations that he was insolvent when in fact he then owned eight sections of Texas lands, where the evidence shows that, prior to such settlement, but after rendition of the judgments, defendant had conveyed the lands to his wife for "love and affection," and plaintiffs then knew of these facts, and were advised that, although defendant claimed that the lands were the separate property of his wife, they could be subjected to the payment of the judgments.

2.—Same—Proof of Transfer of Judgment.

In an action on judgments, brought by an assignee thereof, the execution of the transfer of the judgments should be proved before they are admitted in evidence.

Error from Taylor. Tried below before Hon. N. R. Lindsey.

Bomar & Bomar and *Cockrell & Hardwicke,* for plaintiff in error.

John Bowyer, J. F. Cunningham, and *Leggett & Kirby,* for defendant in error.

HUNTER, ASSOCIATE JUSTICE.—This suit was brought April 12, 1895, on two judgments amounting in the aggregate to about $9000, rendered by the Superior Court of Stanislaus County, California, on the 16th day of November, 1893, in favor of H. B. Davis and his wife, Elizabeth C. Davis, against Montgomery Baggs. These judgments revived two certain previous judgments in favor of same parties against same defendant, rendered in the same court on —— day of ———, 1886, in suits commenced in said court on June 22, 1886. Appellee, Hale, alleges that he is the legal owner of said judgments, but that said Davis and

wife have an equitable interest therein, and that he sues for their benefit as well as his own. A writ of attachment was sued out and levied on eight sections of land in Runnels County.

The defendant answers by general denial, and specially that the judgments sued on had been satisfied in full, and released and satisfied of record on the 29th day of June, 1894, by virtue of a settlement made by and between defendant and one R. A. Prouty, agent and attorney in fact for the said Davises, duly authorized in writing so to do, whereby defendant paid the said Prouty $1000, which was accepted by him in full settlement of said judgments.

The reply of plaintiff to this plea was that the release and satisfaction pleaded by defendant was obtained by false representations, in that the defendant represented to said Prouty that he was insolvent and had no property out of which said judgments or any part thereof could be made, and that he had no means with which to pay said judgments; when in truth and in fact he was then, and is now, the owner of eight sections of land of 640 acres each, attached in this suit, and which were then and are now of the value of $3 per acre.

The case was tried by a jury, and verdict and judgment went against Baggs, and he has appealed to this Court, assigning errors on the charge, on the admission of evidence, and that the verdict of the jury was contrary to the evidence.

The evidence was uncontradicted that the settlement and release of the judgments were made as alleged, and upon the representations of Baggs as alleged, but it also tended to prove that the Davises and Prouty knew at the time the settlement was made and long before that these section of land had been purchased by Baggs in February and March, 1883, and that on the 28th day of October, 1885, he conveyed them to his wife for the expressed consideration of "love and affection," and at the time of the settlement, which was made in San Francisco, Cal., Prouty asked him about these Texas lands, and Baggs told him they belonged to his wife, and were her separate property. The indebtedness upon which the California judgments were rendered arose in October, 1883, after Baggs became the owner of the lands and before he conveyed them to his wife, but no lien was fixed upon them in favor of the indebtedness until the levy of the attachment in this case. Prouty had been advised, it seems, by lawyers in Texas a few months before the settlement was made, that the lands could be subjected to the payment of the debt, and the judgments were revived with the view of suing on them in Texas and attaching the lands. These are facts which were testified to by Prouty and Davis, and as recited in letters written by Prouty to Davis, a short time before the judgments were revived and the settlement made.

It seems, then, from this evidence, that both the Davises and Mr. Prouty knew as much about the lands in Texas then as they knew at the trial. They knew about the consideration in the deed from Baggs to his wife, and, it seems, about the Texas law governing such transactions between husband and wife as affecting the rights of creditors; and, knowing all

these facts, the wonder is why the settlement was made at $1000. But however that may be, it is difficult to see how Mr. Prouty could have been misled by Baggs' statement that he had no property out of which the judgments could be made. He was justified in stating that the lands were his wife's separate property, for so they were under that deed of gift, though they may have been subject to the payment of the Davis debt, whenever a lien was fixed upon the lands to secure it, by the levy of judicial process, which Prouty, it seems, understood and contemplated doing.

We conclude, therefore, that the verdict of the jury is contrary to the evidence, and a new trial should have been granted upon this ground, as presented in the motion therefor. We also think that the execution of the transfer of the judgments should have been proved before they were admitted in evidence. The charge, we think, is also subject in some respects to some of the criticisms made against it in appellant's brief under the fourth, fifth, sixth, ninth, tenth, twelfth, fifteenth, and sixteenth assignments of error.

We are therefore of opinion that the judgment in this cause ought to be reversed and the cause remanded for a new trial, and it is so ordered.

Reversed and remanded.

D. C. NOBLE v. GEORGE WILDER.

Decided February 23, 1901.

1.—Contract of Lease—Measure of Damages for Breach.

In an action to recover damages for breach, on the part of defendant, of a contract to sublet and surrender a storehouse to plaintiff, in consideration of $250 cash paid, and not to do business therein during a specified year, and the damages for a breach thereof were not fixed by the contract or otherwise liquidated by the parties, the amount thereof should have been left to the jury, and it was error for the court's charge to fix, absolutely, the agreed lease price of $250 as the measure of damages for defendant's failure to surrender possession of the house to plaintiff.

2.—Same—Consequential Damages.

For breach of that part of the contract by which defendant agreed that he would not continue to carry on the business of selling groceries in the leased storehouse during the year specified, the measure of plaintiff's damages was the loss he sustained by reason thereof, and not the profits made by the defendant in so carrying on the business.

Appeal from the County Court of Parker. Tried below before Hon. D. M. Alexander.

Martin & Martin and *G. A. McCall,* for appellant.

J. M. Richards and *Bidwell & Stennis,* for appellee.

HUNTER, ASSOCIATE JUSTICE.—We adopt the statement of this case made by the county judge in his charge to the jury, which is as follows:

"In this case the plaintiff, George Wilder, sues the defendant, D. C. Noble, alleging that he paid to defendant the sum of $250, in consideration of the transfer and relinquishment to him of all of defendant's right and interest in the lease of a certain store building for the year 1900, which contract he alleges was approved or acquiesced in by the owner of the building, W. R. Woodhouse. Plaintiff further alleges that defendant has breached his contract, whereby he has been damaged in the sum of $250. He further alleges that defendant agreed, in consideration for said $250, that he would not sell groceries in said building during the year 1900, and alleges that in violation of said contract defendant, on or about February 26, 1900, took possession of said building, and has since said time been selling groceries in said buildings and drawn plaintiff's trade, whereby he has been damaged $100 per month, aggregating $500.

"Defendant denies plaintiff's allegations, and alleges that if plaintiff ever had any right to said house, he voluntarily abandoned it, and, further, that if plaintiff ever had any lease to said house, said building was destroyed by fire on January 7, 1900, whereby said lease contract was terminated."

The evidence tended to establish the contract as alleged by the appellee, and the breach thereof, and the evidence of the amount of damages was conflicting and uncertain, but uncontradicted as to the amount paid to Noble by Wilder as a consideration for the agreement to vacate the premises and for a transfer of the lease thereon.

Verdict and judgment went for the plaintiff below, and the defendant has appealed to this court.

On the trial the court charged the jury as follows: "(3) Now if you believe and find from the evidence that defendant, or defendant with others, had a lease on the building in controversy for the year 1900, and that in consideration of the payment by plaintiff of $250 for himself and others he relinquished his claim and interest in said lease contract and agreed to surrender possession of said building to plaintiff Wilder for the year 1900, which subletting was agreed to or acquiesced in by W. R. Woodhouse, the owner of the building, and you further find from the evidence that defendant Noble has breached said contract, and in violation thereof assumed possession and control of said building, you will find for plaintiff, as damages, the sum of $250, upon this phase of the case, unless you should further find from the evidence that plaintiff had abandoned his claim or interest in said building; and in this connection you are charged that plaintiff would not, of necessity, have to occupy said building as a grocery store, but such abandonment must have been an abandonment of all plaintiff Wilder's claim to the lease of said building. Should you find from the evidence that plaintiff Wilder had so abandoned his claim to the said lease contract, and had no intention of further using or claiming said house for the year 1900, then, in that event, you will find for defendant Noble.

"(4) Should you further find from the evidence that at the time of making said contract with Wilder (if you find such contract existed),

Noble agreed, as part of the consideration for said $250, that he would not resume business in said house during the year 1900, and you further find that Noble violated said contract and resumed business in said building, then you will find for plaintiff, as additional damages, such amount as the evidence may show defendant Noble has received as profits, if any, since February 26, 1900, not to exceed the amount sought to be so recovered."

Error is assigned to paragraph 3 of said charge, and we think it must be sustained. The action is one to recover damages for the breach of a contract on the part of Noble to surrender the storehouse and premises to Wilder, and not to do business therein during the year 1900, and the amount of damages was not agreed upon or otherwise liquidated by the parties in the contract or otherwise; hence, the amount thereof should have been left to the jury under the allegations and evidence.

The fourth paragraph is erroneous (though no error is assigned thereon) in fixing the amount of consequential damages which might be recovered by Wilder at the amount of the profits Noble made in the business he carried on in the house during the year 1900. We think, on this phase of the case, the damages, if any, would be the loss sustained by Wilder, not the profits made by Noble.

For the error in the third paragraph of the charge, the judgment is reversed and the cause remanded.

Reversed and remanded.

J. S. O'KEEFE ET AL. v. RICHARD MCPHERSON.

Decided February 23, 1901.

1.—State School Land—Forfeiture—Resale.

Under the statutes governing a sale of State school land made to an actual settler in 1897 and providing for a forfeiture of the sale in case of nonpayment of interest due thereon or nonoccupancy of the land, no forfeiture takes place, though there be such default by the purchaser, until the Land Commissioner makes in his office the indorsement of "Land forfeited," as required by the statute; and until this be done, the land can not be again purchased from the State by another. Sayles' Civ. Stats., arts. 4218l, 4218j. Bank v. Dowlearn, 59 Southwestern Reporter, 308, disapproved.

2.—Same—Listing Land With County Clerk.

Even if such forfeiture was duly indorsed and declared by the Land Commissioner, the land would not be subject to sale again until he had listed it with the county clerk, or otherwise placed it on the market under some proper regulation.

3.—Same—Abandonment of Purchase.

A sale of the land to a minor, made by the original purchaser before his contract is fulfilled with the State, can not, even of it be assumed that such sale to the minor is void, work an abandonment of the purchase such as will, of itself alone, authorize the Land Commissioner to resell the land to another, and without taking any of the steps requisite to placing it again on the market.

4.—Same—Sale to Minor.

While considering it not necessary to the disposition of this case to decide whether a sale of State school land to a minor, over 18 years old and an actual

settler, is void or not, the court deems it proper to say that it is disposed to adhere to its ruling in Weatherford v. McFadden, 21 Texas Civil Appeals, 260, upholding the validity of such a sale, as such ruling is not necessarily in conflict with Walker v. Rogan, 93 Texas, 248.

Error from Mitchell. Tried below before Hon. W. R. Smith.

Jeffress & Hooper, Earnest & Shepherd, and *Tarlton & Ayres,* for plaintiff in error.

Martin Dies, for defendant in error.

STEPHENS, ASSOCIATE JUSTICE.—O. D. Holloway was the original purchaser from the State of the school land in controversy, that is, section 20 and the north half of 32, block 26, Mitchell County. The controversy as to section 10, block 27 need not be noticed. The date of Holloway's purchase, which was valid and not questioned, was August 28, 1897, he being then an actual settler on section 20. May 20, 1898, he sold the land so acquired, and surrendered possession to J. S. O'Keefe, a minor over 18 years old, who at once became an actual settler on section 20, and a purchaser from the State of that section and the north half of 32 by the substitution of his own affidavit and obligation for those of Holloway. March 29, 1900, Richard McPherson, having invaded the possession of O'Keefe, made application to purchase the land in controversy as an actual settler on section 20, but his application was rejected by the Commissioner of the General Land Office. This suit was consequently brought by him against O'Keefe to establish his right to the land. The only issue submitted to the jury was whether or not McPherson was an actual settler when he made his application to purchase. The evidence warranted the verdict rendered in his favor upon this issue, and upon all other issues of fact the evidence was such as to warrant the court in treating them as not open to controversy. We proceed, therefore, to consider the questions of law arising upon the established facts.

McPherson evidently undertook to acquire the land from the State, and prevailed in the trial below, upon the assumption that the transfer from Holloway to O'Keefe, because of the minority of O'Keefe and because of the abandonment of possession by Holloway, had the effect of placing the land again upon the market; but in so holding we think the court erred. If it be conceded that the substitution of O'Keefe for Holloway as purchaser from the State was not authorized by law, that did not of itself, or together with the surrender or abandonment of possession by Holloway, work a forfeiture of the Holloway purchase, and place the land back upon the market. The decisions of our Supreme Court have established the proposition as the law of this State that any valid purchase of public school lands may be canceled by the State for default on the part of the purchaser in the payment of annual interest, without reentry or judicial ascertainment, upon the ground that, as the superior

title remains in the State and the contract is executory, the State has the same right as any other vendor, upon default of the vendee, to elect to treat the contract of sale as broken and terminated. Fristoe v. Blum, 92 Texas, 76; Standifer v. Wilson, 93 Texas, 232. But we know of no decision of that court warranting a third party—an intending purchaser, to make this election for the State. One recent decision has been found which holds that it is not necessary for the Land Commissioner to make the indorsement, "Land forfeited," as prescribed by law. Savings Bank v. Dowlearn, 59 S. W. Rep., 308. This requirement of the statute is held in the case just cited to be merely directory; but we can not accept this view. We note also that a writ of error seems to have been granted in the case, which is doubtless now pending in the Supreme Court. See foot note, 59 S. W. Rep., 308. The Land Commissioner is not the owner of the land, but merely the agent of the State, acting under a limited power of attorney, and must act in the manner prescribed. It is by taking such action on his part that the State elects, without suit, to rescind and not otherwise. This is clearly shown by the expressed will of the State as declared by the Legislature, to the effect that the commissioner "shall" make the indorsement, "and thereupon said land shall *thereby* be forfeited to the State," etc. Sayles' Civ. Stat., arts 4218l, 4218ll. It is only after this is done that the land can be resold, and so important is it, that the time allowed a purchaser by the last of these articles in which to contest the forfeiture by suit is fixed by the date of the indorsement, "Land forfeited."

But it is contended in behalf of McPherson that the default of the purchaser in failing to reside on the land as required by law and in the contract of purchase, unlike the default in payment of interest, itself works a forfeiture, and places the land again on the market without any action on the part of the Land Commissioner. This contention involves a construction of the following language of section 11 of the Act of 1895, (Sayles' Civ. Statutes, article, 4218l): "And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the State, in the same manner as for nonpayment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred." Just preceding this sentence are the provisions for forfeiture for failure to pay interest. Section 9 of the same act (Sayles' Civil Statutes, article 4218j) provides that under the conditions there named, for any temporary abandonment of the land on account of the drouth, purchasers "shall not have the forfeiture *declared* against them under the law providing for the forfeiture of such lands for nonoccupancy." Unless by the clause, "in the same manner as for nonpayment of interest," the Legislature meant to refer to the next preceding sentence of that section for the manner of declaring the forfeiture, we are unable to explain why it was inserted at all, as it was not in the previous act on the subject of forfeiture, which was otherwise identical; or what it means; or what was meant in the quotation above made from the ninth section of the same

act by the use of the word "declared" in connection with forfeiture for nonoccupancy. What was said in the opinion of Chief Justice Tarlton, in Atkinson v. Bilger, 4 Texas Civil Appeals, 99, and by Justice Head, in Metzler v. Johnson, 1 Texaas Civil Appeals, 137, was with reference to the Act of 1887, which contained no such clause. In McKnight v. Clark, 58 Southwestern Reporter, 146, we were considering the effect of the failure of a "bona fide owner of and resident upon" other lands than school lands to reside upon the same or a part of the additional lands purchased as provided in article 4218fff, to which the clause of forfeiture above quoted does not seem altogether applicable, for such purchaser might fully comply with the article last named and his land be subject to forfeiture under article 4218l, which makes the failure to reside upon the land purchased, and not upon "other land," the ground of forfeiture. But however this may be, we are of opinion that it required action on the part of the Commissioner to forfeit the purchase of Holloway, it being legal and valid till it was in some way set aside at the instance of the State. We are also of opinion that the case is within the spirit if not the letter of the decision in Willoughby v. Townsend, 93 Texas, 80. True, the language "and such land shall be again for sale as if no such sale and forfeiture had occurred," is quite comprehensive and explicit, but not more so than the language in article 4218f, which declares that when any portion of the school land has been classified to the satisfaction of the Commissioner it "shall be subject to sale," and yet it was held in the case last cited that it is not really subject to sale till the Commissioner has notified the county clerk of the fact. What probably was meant is that it is again "subject to sale," as it originally was when classified to the satisfaction of the Commissioner, to be put upon the market and sold in the same manner. While it is not expressly declared that it shall be placed upon the market and sold as provided in the act, nothing else could have been contemplated, for there is no authority elsewhere prescribing how the Commissioner is to proceed. If the case be one not provided for in the act as to the manner of placing the land on the market, then it was incumbent on McPherson to show that some regulation had been adopted by the Commissioner covering such cases, and that he had complied with it. As the Commissioner rejected his application, the burden was on him to show that he was not warranted in doing so, especially as he was the plaintiff in the action. Reeves v. Smith, 23 Texas Civ. App., 711.

In view of these conclusions it becomes unnecessary to consider the effect of O'Keefe's minority upon his rights in the premises. Lest, however, our silence upon a question vitally affecting so many school land titles in Texas should be misconstrued, as it seems to have been a custom or regulation of the General Land Office of long standing to sell such lands to minors over the age of 18, we will add that we are disposed to adhere to the decision made by this court in Weatherford v. McFadden, 21 Texas Civil Appeals, 260, notwithstanding the subsequent decision of the Supreme Court in Walker v. Rogan, 93 Texas, 248. While there

may be conflict between the opinions in these cases, the facts of the two cases were quite different, and they arose under different statutes. It seems to us that cogent reasons may be given why a sale to a minor who is old enough to become an actual settler under statutes making that the *sole* qualification of a purchaser should be upheld, as was done in Weatherford v. McFadden, supra, especially where such statute has been repeatedly re-enacted without change in this respect after being construed by the land department of the State government for a series of years as authorizing such sales. To now overturn a construction so long acted upon by the Land Commissioner, and apparently sanctioned by the Legislature, will probably disturb numerous titles to school lands in this State, not merely of minors, old enough to become and who have become actual settlers, but also of many others who deraign title from such purchasers. The decision in Walker v. Rogan, supra, does not, we think, require of us such a course. But not finding it necessary in this case to discuss the merits of that question, we abstain from doing so.

Upon the conclusions already stated the judgment will be reversed and here rendered against defendant in error.

Reversed and rendered.

ON MOTION FOR REHEARING.

It is urged in the written argument submitted with the motion that in the conclusions already filed we "failed to distinguish between an abandonment of the purchase by one who files his voluntary conveyance, and an abandonment of the land" by failure to reside on it as required by law. But we fail to see how this distinction is to benefit defendant in error. If the action of Holloway in making, or attempting to make, a transfer of his right to O'Keefe is to be construed as an abandonment of the original purchase, so as to authorize the State, like any other vendor, to elect to treat the contract of sale as broken and terminated, there is no evidence in this record that the State or any of its officers ever made any such election. The acceptance by the Land Commissioner of O'Keefe as purchaser in lieu of Holloway was an affirmance rather than a repudiation of the original sale, and if, by reason of the minority of O'Keefe, this substitution was not authorized by law, the act of the Land Commissioner in assenting to it was in no sense the act of the State, and did not affect the question one way or the other. If, then, without any election on the part of the State, a purchaser like Holloway can put an end to his obligation as such purchaser by his own voluntary abandonment of the contract, what becomes of the argument that a minor can not become a purchaser of school land because he can only execute a voidable obligation? In other words, if the law is to receive the construction that any purchaser of school land may terminate his contract with the State at will, what ground is left for the contention that the disability of minority is a bar to the right of an

actual settler otherwise competent to purchase such land from the State? The question admits of but one answer, for the obligation, whether it be that of adult or a minor, would be voidable at the pleasure of the maker. The argument proves too much for defendant in error, for it establishes the validity of the transfer to O'Keefe, notwithstanding his minority.

It is, however, insisted that as Holloway was authorized by article 4218k of the Revised Statutes to have a new purchaser substituted, what was done in this instance to accomplish that result had the effect of placing the land again on the market. But manifestly there no merit in this contention. If the land can be said in such case to be again placed on the market, it is certinly in a very limited sense, for it can only be sold under this article of the statute to the person selected by the original purchaser.

As to the difficulty of declaring a forfeiture where the obligation of a minor has been substituted for that of the original purchaser, and the original obligation has been canceled or surrendered, we need only add that if the Land Commissioner has, by doing what the law did not authorize, placed it out of his power to declare a forfeiture as provided by law, the State is not without a remedy, or at least not without the power to create one.

The motion will be overruled.

Overruled.

Writ of error refused.

J. C. LEAGUE v. W. T. SCOTT ET AL.

Decided February 23, 1901.

1.—Deed—Description—Mistake—Reference to Patent.

A deed describing the land conveyed as a "tract of land containing 640 acres, situated in Eastland County, and known as survey No. 480, patent No. 96, Southern Pacific R. R., reference being made to the patent for further description," is not void for uncertainty in the description, no other patent No. 96 ever having been issued to the Southern Pacific Railroad Company, although the true number of the survey covered by patent No. 96 is No. 473, and there is in Eastland County a Southern Pacific Railway Company Survey No. 480 (its patent number not appearing) which, along with all other even numbered railroad surveys, originally belonged to the public school fund, and therefore could not have been patented to the railroad company.

2.—Judgment of Federal Court Not Domestic—Collateral Attack in State Court—Jurisdiction Over Person.

A consent decree entered in the United States Circuit Court for the Eastern District of Texas, reciting that S., one of the defendants, appeared by T., his attorney, and consented to the decree, not being, as to the Texas State courts, a domestic judgment, may be collaterally attacked therein for want of jurisdiction over the person by showing that S. was not cited in the case, and never authorized T. to appear for him and consent to such decree.

Appeal from Eastland. Tried below before Hon. N. R. Lindsey.

J. J. Butts, for appellant.

Looney & Hamner, for appellees.

CONNER, CHIEF JUSTICE.—This is an appeal from a judgment in appellees' favor for a section of land in Eastland County. Both parties claim under W. T. Scott, Sr., as common source of title. Appellant's claim of title depends upon the effect to be given an amended decree of the Circuit Court of the United States for the Eastern District of Texas entered on February 18, 1889. This decree recited that appellee, W. T. Scott, who was therein sued as an heir of W. T. Scott, Sr., appeared by his attorney, James Turner, and consented to said decree which directed the sale of certain lands therein described, including the section involved in this suit. At the sale so directed appellant became the purchaser. Appellee claimed by deed from W. T. Scott, Sr., to James Turner, and from James Turner to Peter Youree, and by further mesne conveyances to himself,—all antedating said decree. The conveyance from Turner to Peter Youree described the land therein conveyed as "all that certain lot, tract, or parcel of land containing 640 acres, situated in Eastland County, Texas, and known as survey No. 480, patent No. 96, Southern Pacific R. R., reference being made to the patent for further description."

If this description does not render the deed from James Turner to Peter Youree void for uncertainty, it is, in effect, admitted that appellee was entitled to recover, unless barred by the decree mentioned; said decree having never been set aside or annulled in any proceeding having that end in view. The survey in controversy is survey No. 173 of the Southern Pacific Railroad Company surveys in said county, and is properly described in its patent number, which is 96. There is also a Southern Pacific Railroad Company survey No. 480 in said county, the patent number of which is not shown. We are of opinion that the uncertainty, or apparent uncertainty, of description thus presented is not such as to authorize us to declare the deed from James Turner to Peter Youree void. It is a familiar maxim that, "id certum est quod certum redi potest," and we think the reference to the patent for further description a reference to patent No. 96, and that such reference rendered certain the identity of the land intended to be conveyed. No other patent was referred to. No other patent of that number was ever issued to the Southern Pacific Railroad Company. It correctly described the land in controversy, which may possibly also have been known as survey No. 480, the contrary not affirmatively appearing from the record. Survey No. 480 was an even-numbered section that under the law became a part of the public free school fund, and could not have been patented to the Southern Pacific Railway Company. We, therefore, approve the ruling of the court in admitting said deed. See Cleveland v. Sims, 69 Texas, 153; Arambula v. Sullivan, 80 Texas, 615; Cartright v. Trueblood, 90

Texas, 535; Kenyon v. Knipe, 13 La. Rep. Ann., 143, and note; Cattle Co. v. Whitefort, 21 Texas Civ. App., 314.

On the second question presented appellee offered evidence to the effect that he was not cited in the proceeding in which said amended decree was rendered, nor was James Turner authorized to appear and answer for him, or to consent to such decree. This evidence is undisputed; but it is insisted that in a collateral proceeding, as this was, the decree is conclusive and that such evidence was inadmissible. It is held in some of the authorities that where the decree recites appearance by attorney merely, this fact may always be disputed. Black on Judg., sec. 272, 903; Freem. on Judg., sec. 499. In a number of States also, in exception to the general rule, it may always be shown that the court did not acquire jurisdiction over the person. See Black on Judg., sec. 275, and authorities cited, particularly the case of Ferguson v. Crawford, 70 N. Y., 253, where, in an able review of authorities, the court so concludes, on the ground that there law and equity, as with us, are both administered by the same court, and that in equity it might always be shown that the court never acquired jurisdiction over the person. See also Freem. on Judg., secs. 484a, 486, 495, 499; Black on Judg., sec. 276. But however this may be, it is universally held, so far as we are advised, that the recitals of service or of appearance in judgments are conclusive only in courts of domestic jurisdiction, and, while we have heretofore expressed some doubt as to the wisdom of such conclusion, yet, in harmony with the cases hereinafter cited, we conclude that the amended decree under consideration was not a domestic judgment in the sense that it could not be shown that the court failed to acquire jurisdiction over the person of appellee. See Black on Judg., sec. 275; Cooper v. Newell, 173 U. S., 555; 43 L. R. A., 808; Railway v. Barton, 24 Texas Civ. App., —, 57 S. W. Rep., 292; Harby v. Patterson, 59 S. W. Rep., 63, where the subject is fully discussed.

Nor do we think the fact that appellee was a resident of the State of controlling effect. The decisions cited, holding that judgments of State and Federal courts are not domestic, rest upon the ground, not of adverse citizenship, but of diverse derivation of powers, viz,, on the fact that they "derive their jurisdiction and authority from different governments."

We conclude by saying that we have found no reversible error in the proceedings, and we accordingly adopt the trial court's findings of fact and conclusions of law, and affirm the judgment.

Affirmed.

Writ of error refused.

R. McCormick v. Missouri, Kansas & Texas Railway Company of Texas.

Decided February 23, 1901.

1.—Damages for Personal Injuries—Amount—Fact Case.

See the opinion for evidence under which the appellate court declined to disturb a verdict for $500 in favor of a railroad fireman for personal injuries, complained of on the ground that the amount was too small.

2.—New Trial—Rule Applicable to Amount of Damages.

Where there is not a legal measure of damages, or they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not, although it may think the verdict to be for considerably more or less than it ought to have been, interfere with it, unless the amount allowed is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake.

Appeal from Tarrant. Tried below before Hon. Irby Dunklin.

Carden & Carden and *Wynne, McCart & Bowlin,* for appellant.

Stanley, Spoonts & Thompson and *T. S. Miller,* for appellee.

CONNER, Chief Justice.—Appellant brought this suit in the District Court of Tarrant County against appellee on the 14th day of November, 1899, for damages for personal injuries alleged to have been received by appellant through negligence of appellee, by the explosion of certain parts of an engine or locomotive, upon which appellant was engaged as fireman for appellee, on the 29th day of May, 1899.

The case was tried in the court below before a jury on the 17th day of April, 1900, and resulted in a verdict and judgment for appellant for $500, and appellant brings the case to this court by writ of error.

Substantially but one question is presented on this appeal, and that is, whether the evidence sustains the verdict and judgment below. Appellant asserts that the undisputed evidence shows that he was seriously injured; that he had been incapacitated for labor for more than ten months preceding the trial; that he was earning at the time of his injury $75 per month; that he had suffered great pain; had incurred liabilities for doctor's bills, and that "there was not a scintilla of evidence" to the contrary. It is therefore insisted that the damages awarded appellant are grossly inadequate.

The statute provides that "new trials may be granted as well when the damages are manifestly too small as when they are too large." Rev. Stats., art. 1452. And this has been held to apply as well to actions ex delicto as to actions ex contractu. Allison v. Railway, 29 S. W. Rep., 425. So that, as before stated, the question is simply whether the state of the evidence is such as to require us to set aside the verdict of the jury and the judgment of the trial court.

We have very carefully considered the evidence and find ourselves unable to say that the damages awarded appellant are "manifestly too small," or that there is no evidence tending to contradict the evidence offered in behalf of appellant as to the extent of his injuries. The evidence was sharply conflicting upon, if it did not preponderate in favor of, the defense that appellant's injuries resulted from a cause other than that alleged in his petition. There was evidence also to the effect that immediately after the explosion appellant was walking around and about the engine; assisted in extinguishing the fire therein; that he made no complaint of any injury at the time; that he was not scalded or visibly bruised; and that he was able to visit the office of his physicians for treatment after the first or second time of treatment. The testimony of the physicians first called upon to treat him was not produced; the physicians testifying seemed to differ in conclusion in their diagnosis and prognosis as to appellant's condition. While a great number of nonexpert witnesses testified to the effect that appellant was severely injured, it was developed that such conclusion was based largely, if not entirely, upon evidences of injury and pain easily simulated. The reasonable value of the physicians' services was not shown. So that while other circumstances might be adverted to, we think it sufficient to say that in our opinion the evidence was not so conclusively against the verdict as to indicate that the jury were actuated by improper influences. The rule upon the subject approved by this court is thus stated in the case cited supra: "Where there is not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not ordinarily interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the court, and the law does not recognize in the latter the power to substitute its own judgment for that of the jury. Although the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake, or, in other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation. When the verdict is thus excessive or deficient, the trial court, in its discretion, will interpose and set it aside."

The cause seems to have been fairly submitted, the verdict of the jury to have been duly approved by the trial court, and we find no sufficient ground upon which to disturb the result. The judgment below is accordingly affirmed.

Affirmed.

Writ of error refused.

THIRD DISTRICT, 1901.

LEON BRIN V. W. C. ANDERSON AND WIFE.

Decided February 6, 1901.

1.—Homestead—Setting Aside Sale—Cross-Action—Foreclosure of Judgment Lien.

In a suit to set aside a sale of plaintiff's homestead under a trust deed, defendant, the creditor and purchaser under the sale, could maintain a cross-action to subject other lands of defendant to a judgment lien for the debt under which the sale had been made.

2.—Judgment Lien—Record of Abstract—Pleading.

An averment in a proceeding to foreclose a judgment lien that the judgment was "alphabetically and otherwise duly indexed and cross-indexed as required by law in such cases," was sufficient.

3.—Homestead—Designation by Husband—Orchard.

Planting an orchard upon a portion of the land occupied as a home impresses it with that character of homestead right which can not be removed by the husband's statutory designation of the homestead upon other parts of a tract exceeding in extent the homestead allowance.

4.—Designation of Homestead.

See facts under which a designation of the homestead by the husband in good faith out of a larger tract was held good, though it abandoned cultivated lands more convenient and better than some selected, involved a possible loss of a part of the two hundred acre exemption, through conflict of a part of the land designated with older surveys, and selected as a part of the exemption separate property of the wife in preference to community property.

Appeal from Brown. Tried below before Hon. J. O. Woodward.

T. C. Wilkinson and *G. N. Harrison,* for appellant.

Goodwin & Grinnan, for appellees.

KEY, ASSOCIATE JUSTICE.—This is an action of trespass to try title to 64 acres of land, W. C. Anderson and his wife being the plaintiffs and Leon Brin the defendant. The plaintiffs prevailed in the court below and the defendant has appealed.

Among other matters, the plaintiffs alleged in their petition that on March 26, 1896, the land in controversy was their homestead, it being part of 217 acres of land on the William Guyman survey owned by them. That on the day referred to, W. C. Anderson executed a trust deed in favor of the defendant on the 217 acres of land to secure a debt of about $1500; that on December 3, 1896, in a suit brought against W. C. Anderson, Leon Brin recovered judgment for said debt and a foreclosure of the deed of trust, under which judgment the 217 acres of land were sold and bought in by Brin. They also alleged that, the 64

acres of land in controversy being part of their homestead, the deed of trust and foreclosure sale were void and Brin acquired no title thereunder.

The defendant Brin, among other pleas, set up cross-action, alleging that there was a balance still owing and due on his judgment against W. C. Anderson; that he caused an abstract of said judgment to be made and recorded as the law directs, in Brown County, where the land in controversy and other lands described in the plea are situated; and he prayed, in the event of the plaintiffs' recovery of the land sued for, that his judgment lien created by recording the abstract be foreclosed on the other lands described in the plea. This plea alleged that the abstract of judgment was "alphabetically and otherwise duly indexed and cross-indexed, as required by law in such cases."

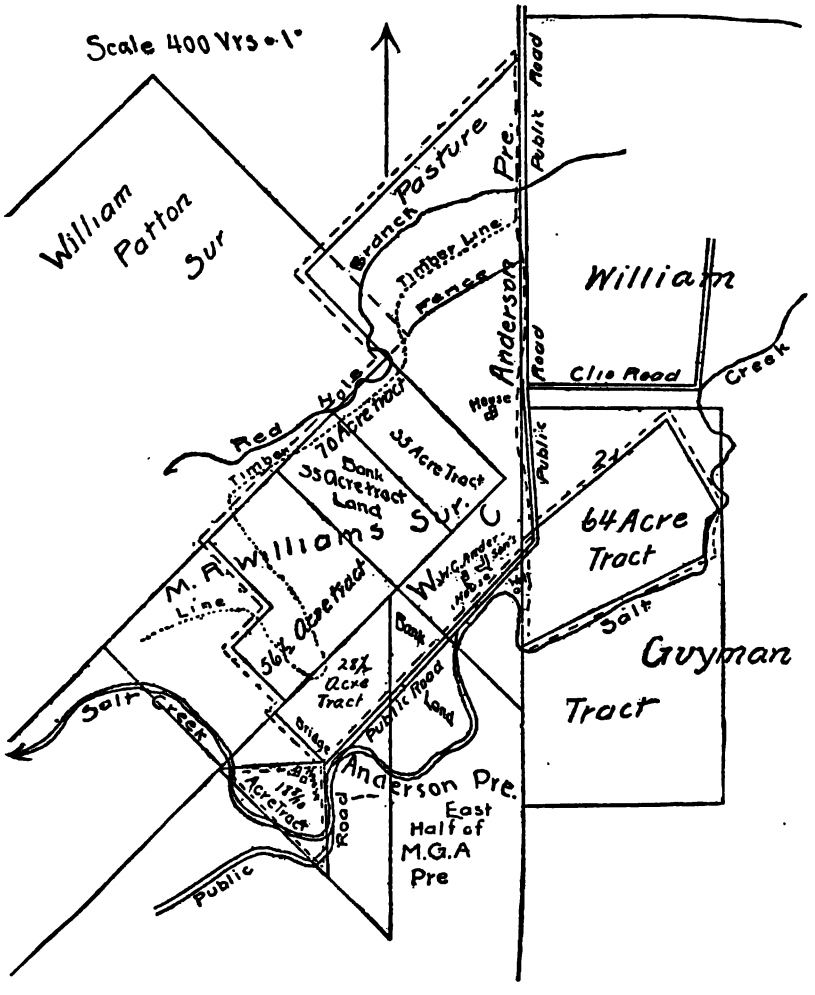
The ruling of the court in sustaining exceptions to and striking out the defendant's cross-action is assigned as error, and we think the assignment is well taken. The plaintiffs by their petition in this case attacked the judgment in the former suit in so far as it undertook to foreclose the lien on the land in controversy, and we think the matters pleaded in the cross-action were so connected with and incidental to the judgment referred to and the averments in the plaintiffs' petition, as to bring them within the rule permitting the filing of counterclaims and pleas in reconvention. Clegg v. Varnell, 18 Texas, 294; Carothers v. Thorp, 21 Texas, 361; Jones v. Ford, 60 Texas, 129; Scalf v. Tompkins, 61 Texas, 479. We are also of the opinion that the averments in reference to indexing the abstract were sufficient.

In reference to the homestead question it was shown by the undisputed evidence that at the time he designated his homestead, and before he executed the deed of trust to appellant, W. C. Anderson and his wife owned several connected tracts of land, amounting in the aggregate to 500 acres or more. The sketch on page 325 indicates the location and condition of the several tracts at the time referred to.

March 26, 1896, on the same day of, but prior to, the execution of the trust deed under which appellant claims, W. C. Anderson, in the manner prescribed by statute, executed and had recorded a written designation of his homestead, composed of the W. C. Anderson pre-empton, the 28 1-2-acre tract and the 18 8-10-acre tract. The designation describes the W. C. Anderson pre-emption as containing 159 9-10 acres; and, so considering it, the designation includes over 200 acres. W. C. Anderson was then a married man and resided with his family on his pre-emption survey, his residence, outhouses, well, and an old orchard being on that survey. There was also a field in cultivation on that survey near his residence, consisting of at least 12 acres. There was a tenant house in the north triangle of that survey, near which there was about 15 acres of land, part of that survey, in cultivation. The upper part of the north triangle of that survey was fenced off as a pasture, but was in appellees' possession and use at the time.

Most of the 70-acre tract on the M. R. Williams survey was in culti-

vation; and on the 56 1-2-acre tract there was at least 12 acres in cultivation. The 18 8-10-acre tract had a tenant house upon it, and at least 7 acres in cultivation. It was inclosed by a fence, but not included in the inclosure with the other lands. There was at least 12 acres on the 28 1-2-acre tract in cultivation. Appellees had one large inclosure



including all of the W. C. Anderson pre-emption, except the small triangle in the south end and on the southeast side of the public road, which seems to have been fenced off as a pasture, though this is not absolutely certain from the testimony.

The large inclosure referred to is indicated by the dotted line, beginning at the extreme north corner of the W. C. Anderson pre-emption and extending around to where the public road enters the south line of the 28 1-2-acre tract; from there the fence runs with the public road

between appellees' residence and the land in controversy, and practically with the east line of the W. C. Anderson pre-emption to the place of beginning.

The Guyman 217-acre tract joins the W. C. Anderson pre-emption on the east. The land in controversy in this suit is part of the Guyman tract, and was at the time in question inclosed as a farm, as indicated by the dotted lines, and all of it, except a few acres, was then in cultivation. On the west end of the 64 acres, and within about 300 feet of his residence, W. C. Anderson had planted another orchard, which the evidence indicates had not reached maturity at the time the homestead designation and trust deed in question were made.

The testimony shows that all the cultivated lands on the several tracts had been in cultivation by W. C. Anderson fifteen or twenty years, a portion of that in controversy having been put in cultivation first. All of the cultivated lands on the several tracts referred to were used and enjoyed by W. C. Anderson in the same general way,—that is, for farm purposes,—ever since they were put in cultivation.

The land in controversy is more conveniently situated with reference to the residence than most of the other lands designated as homestead; and W. C. Anderson testified that he had always claimed the 64 acres as part of his homestead. It was also shown to be a better class of land than that in cultivation on the other tracts.

It was further shown that the W. C. Anderson pre-emption conflicted with the William Patton, which was an older survey, and that before the homestead designation was made, the owner of the Patton had brought suit and recovered from W. C. Anderson 24 acres of the pre-emption survey. This apparently cut the homestead designation down to less than 200 acres; but there is some testimony tending to show that the W. C. Anderson pre-emption contained an excess nearly equal to the shortage referred to.

As before stated, on the same day that the homestead designation was made, and substantially as part of the same transaction, W. C. Anderson executed a deed of trust to appellant, conveying the Guyman 217-acre tract, which includes the land in controversy; and thereafter the deed of trust was foreclosed, and appellant purchased the entire Guyman tract thereunder. This trust deed contained a disclaimer of homestead right in the Guyman survey on the part of W. C. Anderson.

It is also proper to state that at the time in question the 70-acre tract on the north end of the M. R. Williams survey, and the east half of the M. G. Anderson pre-emption survey, were under mortgage to the First National Bank of Brownwood, which mortgage was afterwards foreclosed, and the bank became the purchaser of these lands. That mortgage, like the one to appellant, was executed by W. C. Anderson alone; and after the bank purchased at the foreclosure sale it brought suit against W. C. Anderson for the lands referred to. The suit was compromised and an agreed judgment rendered for the bank for the east half of the M. G. Anderson survey and the south half of the 70-acre

tract. This judgment was rendered more than a year after the homestead designation and the mortgage under which appellant claims were made.

No evidence was submitted tending to show that W. C. Anderson, in designating his homestead, acted otherwise than in good faith or had any purpose to defraud his wife. It is true that he did not consult her in reference to the designation, and she was ignorant of the fact that it had been made until after this suit was brought. And it may be true that he did not make the wisest selection that could have been made, but there is nothing to indicate that he was influenced by any benefit secured or promised to him individually and not participated in by his wife, or that he was actuated by any feeling of malice, ill will or spite toward her. If the selection made was disadvantageous to the wife, it was probably more so to the husband, as it is not likely that she would go to and from the several tracks of land in cultivation as often as he would.

The fact that some of the land designated as homestead was separate property of the wife is of no importance. If it was impressed with the homestead character, the husband had the right to designate it as part of the homestead; and his doing so and thereby excluding the land in controversy from his homestead would not be a fraud upon her.

With the undisputed evidence clearly showing the above facts, we hold with reference to the questions of homestead: (1) That the orchard previously planted on the land in controversy was impressed with the character of homestead right which can not be removed by statutory homestead designation, nor by anything else except abandonment, resulting from permanent change of residence. An orchard intended for family use and located within reasonable distance of the family residence should stand upon the same footing as a garden or cowpen similarly situated and intended for family use. That a garden used for family purposes can not be abandoned as a homestead while so used, was decided in Medlenka v. Downing, 59 Texas, 33. And it makes no difference that there may be another garden or orchard as conveniently situated and not on the land in controversy, it not appearing that the two are in excess of family needs and comforts. Just how much land the orchard embraces is not disclosed by the testimony; and it is therefore impossible for this court to render the proper judgment in reference thereto. (2) With the exception of this orchard, we hold that the homestead designation, having been made in good faith by the husband, and embracing lands used by the family for homestead purposes, he had the power under article 2403 of the Revised Statutes to make the designation, and it is binding upon both the husband and the wife. Affleck v. Wangermann, 93 Texas, 351.

It may be true, after adding the land covered by the orchard, that a shortage will still exist in the homestead designation on account of the loss of the 24 acres, resulting from the conflict between the W. C. Anderson pre-emption and the Patton survey, yet it appears that appellees

have title by limitation, if not otherwise, to the 56 1-2-acre tract on the M. R. Williams survey, which at the time in question was unincumbered, partly in cultivation and impressed with the homestead character. This being true, and it not appearing that appellant was in anywise responsible for the mistake made in designating as part of the homestead the 24 acres on the W. C. Anderson tract in conflict with the older survey, we think the execution of the mortgage on the land in controversy, except the orchard referred to, should be held valid and appellees required to make up the homestead shortage, if any, from the 56 1-2-acre tract.

The charge of the court on the subject of homestead was not in harmony with the views here expressed. Upon another trial, if the evidence be the same, the court, without submitting the question to the jury, should hold the homestead designation binding upon appellees, except as to the orchard; and if the evidence defines the boundaries of the latter with sufficient certainty, judgment should be rendered for the plaintiffs therefor, but for no other portion of the land in controversy.

For the errors pointed out, the judgment will be reversed and the cause remanded.

Reversed and remanded.

CITIZENS RAILWAY COMPANY v. ISHAM FORD.

Decided February 6, 1901.

1.—Contributory Negligence—Requested Charge—Grouping Facts.

On the issue of contributory negligence by one who, crossing in front of a steet car, was struck by another car moving on a parallel track, see a requested instruction grouping certain facts which would constitute contributory negligence which was improperly refused.

2.—Charge.

A requested charge should be read in connection with the instructions given by the court, and need not embrace matters fully covered therein.

3.—Same—Negligence—Causal Connection.

When there is no doubt that conduct of the injured party, such as walking in front of or against a moving car, was a cause of the injury, a charge may declare such conduct, if negligent, to constitute a defense, without submitting the question of its causal connection.

Appeal from McLennan, Fifty-fourth District. Tried below before Hon. Sam R. Scott.

Clark & Bolinger, for appellant.

Eugene Easterling and *J. W. Taylor,* for appellee.

COLLARD, ASSOCIATE JUSTICE.—This suit was brought by appellee, Isham Ford, against the appellant, the Citizens Railway Company, of Waco, Texas, for damages for personal injuries to his wife, Mattie Ford

occasioned by a car of defendant striking her while she was returning to her work at the Pacific Hotel, where she was employed as a pastry cook. She alleged that just as she attempted to cross Fourth street, going east, she saw a car on one of the company's tracks, and that she passed around in front of a car on the track which had stopped to adjust a switch, and while she was walking on across the street with due care, another car of defendant on a parallel track ran against her, causing the injuries for which she sues. It is alleged that the injuries were occasioned by the negligence of the defendant and its servants operating the car. It was alleged by a supplemental petition that she looked carefully to see if the crossing was clear, but could not see the approaching car that struck her, on account of the car that had stopped, and no signals were given by the approaching car, and that the motorman in charge of it could have seen her in time to have stopped, but negligently failed to do so.

Defendant answered by general demurrer and denial, and that plaintiff's wife was guilty of contributory negligence in running in front of the first car, which it is alleged was in motion, and in passing close to it without waiting for it to pass, and also in passing the first car in running up against the second car, which was approaching, without looking or listening for the same, and so caused her own injuries by her negligence, when she could have seen the car and avoided the injury by the use of ordinary care. By supplemental answer defendant specially excepted to the amended supplemental petition, because it was an enlargement of plaintiff's original cause of action, and not a supplemental petition, as it was styled; and further denied all the allegations of the amended supplemental petition. The court overruled all the demurrers and exceptions, defendant excepting.

The trial resulted in a verdict for plaintiff for $1000, for which judgment was rendered, and a new trial being refused, defendant has appealed.

The facts, briefly stated, are: Plaintiff's wife, Mattie Ford, who was employed as pastry cook at the Pacific Hotel, went home to look after her children at noon, and was returning to the hotel about 1 o'clock p. m., and had to cross the street railway track. She was coming from the west going east on her way to the hotel. The tracks of the company—double tracks—ran at this point north and south. When she came near the track on the west a car had stopped in the way, or if moving was moving slowly to make a switch, headed southward on the west track. She passed rapidly in front of this car, a few feet out of the usual path to the south of it. Another car moving in the same direction came up on the east track, also moving southward. When she came to the first car she could not see the second car beyond it. The second car made no halt. There were only a few feet between the two tracks, and about one foot and a half between the cars in passing. She did not see the second car, watching the first car while passing in front of it, and after she passed it and before she knew it, the second car

struck her, causing the injuries alleged. Whether it ran upon her, the front end striking her, or whether she ran upon it, colliding with the side steps is not certain, as upon this the testimony is conflicting. There was nothing between the cars to obstruct the view from one to the other, and if she had been looking in front of her, she could have seen the second car in passing the first and certainly after she had passed it. The testimony would support a finding that no signals were given by the second car on approaching the crossing, though there is testimony of the driver that he sounded the gong on arriving near the crossing.

Opinion.—The court charged the jury that upon certain conditions the plaintiff could recover unless his wife was guilty of contributory negligence, not grouping the facts relied on to show contributory negligence; and then more definitely instructed that if she failed to look and listen for the approaching car, and that a person of ordinary care would have looked and listened, and would have discovered it in time to have avoided the injury, and that such conduct was negligence as defined, and that such negligence contributed to her injuries she would be guilty of contributory negligence, in which event, if the jury should so find, to return a verdict for the defendant.

On the same subject of contributory negligence defendant asked the following special charge: "If you believe from the testimony that Mattie Ford ran in front of defendant's street car, known as Belt car, while it was in motion, and in about six feet of same, and that after this, and without stopping or looking or listening ran into the defendant's car known as Washington-street car in daylight, when both of said cars were in plain view, and if you believe that Mattie Ford could have known by the use of ordinary diligence that both of said cars were passing along said street, and if you further believe that such conduct of Mattie Ford was negligent, and such acts as would not have been performed by a reasonably prudent person under the same circumstances, then, if you so believe, you will find for defendant and so say by your verdict."

It will be seen that the requested charge grouped the facts relied on and pleaded to establish contributory negligence, and that the testimony would warrant the finding of the facts so assembled. The court's charge was not so comprehensive upon the question, and the amendment proposed by the requested charge would more clearly and pertinently have placed the issue before the jury, thus aiding and supplementing the incompleteness of the charge given by the court, and we believe the requested charge ought to have been given, and that it was error to refuse it.

It is true the requested charge did not state that to defeat a recovery the negligence of Mattie Ford must have contributed to the injury, but the court's charge did so, and the charge asked must be read in connection with the proper explanations of the court's instructions upon that subject. So read, it is entirely sufficient.

We believe, however, that there could be no doubt that the conduct of the plaintiff's wife contributed to the injury, if it should be held that she was guilty of negligence as stated in the requested charge, and we hold that in such case it was not necessary to require a finding as to the effect of such negligence. But one conclusion could follow as a result of her negligence if it existed as propounded in the charge asked. The omission, therefore, to demand a finding as to such result is not important.

Because of the error in refusing to give the requested charge, the judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

Application for writ of error dismissed for want of jurisdiction.

L. B. MURRAY v. ISAAC C. EVANS.

Decided February 6, 1901.

1.—Sheriff—Motion Against—Acceptance of Notice.

Where a pleading in nature of a motion to recover against a sheriff the amount of a judgment which he has wrongfully failed to make on execution was filed in the court from which and entitled in the cause in which execution issued, his written acceptance of service in such cause was equivalent to a waiver of the notice of such motion required by article 2386, Revised Statutes.

2.—Same—Judgment by Default.

The statute requiring five days notice of the motion against a sheriff was met and judgment by default warranted where his waiver of notice was signed by him twelve days, though filed in the case only three days, before the judgment.

3.—Same—Necessary Allegations—Construction.

The proceeding by motion against a sheriff under article 2386, Revised Statutes, differs from an ordinary action only in some matters of form, is not penal in its nature, nor so summary as to require the allegations of the motion to be strictly construed. See opinion for motion held, under this rule, good on general demurrer and sufficient to admit evidence.

4.—Motion Against Sheriff—Parties—Sureties.

The sureties on the sheriff's official bond are not necessary parties to a motion for judgment against him for failing to levy an execution.

Error from the County Court of Tom Green. Tried below before Hon. Milton Mays.

J. W. Hill, for plaintiff in error.

No briefs for defendant in error were on file.

KEY, ASSOCIATE JUSTICE.—The basis of this action is the following pleading:

"Isaac C. Evans v. J. D. O'Daniel et al. No. 240.—In County Court, Tom Green County, Texas.

"Now comes the plaintiff in the above styled and numbered cause and represents to the court as follows:

"That the plaintiff herein, on the 8th day of October, 1890, recovered a judgment against the defendants herein, J. D. O'Daniel and William Thaison, for the sum of $352.67, with interest thereon from said 8th day of October, 1890, at the rate of 8 per cent per annum, together with all costs of suit.

"That on the 23d day of May, 1891, an execution issued thereon to Tom Green County, Texas, which execution was returned indorsed as follows: 'Came to hand the 27th day of May, 1891, not executed, no property of J. D. O'Daniel or William Thaison in this county subject to execution. J. W. Johnson, Sheriff Tom Green County, Texas.'

"That on the 22d day of July, 1899, an alias execution issued on said judgment to Coke County, Texas, and was on the 24th day of July, 1899, placed in the hands of L. B. Murray, sheriff of said Coke County; that said Murray failed and refused to execute said alias execution and returned same on the 7th day of August, 1899, not executed; that since the rendition of the judgment hereinbefore mentioned the defendant William Thaison died and left no property in this State subject to execution sufficient to satisfy said judgment; that at the time said alias execution was delivered to said Murray, sheriff as aforesaid, said defendant O'Daniel had real and personal property in his possession in said Coke County, subject to execution sufficient to satisfy said alias execution, and that said judgment was at that time and ever since the rendition thereof in full force and effect, and that said Murray could have made the amount of money in said alias execution specified had he made the levy therein required and commanded.

"Wherefore, premises considered, plaintiff prays that he have judgment against said L. B. Murray, sheriff of Coke County, Texas, for the amount of his said judgment against said J. D. O'Daniel and Wm. Thaison, less the sum of $217.70, paid and credited on said judgment November 8, 1893, for interest thereon from date of rendition thereof, at the rate of 8 per cent per annum, for costs of suit, and for such other relief, general and special, to which he may show himself entitled.

"ALLEN & BRIANT, Attorneys for Plaintiff."

This petition or motion was filed September 20, 1899. No citation or notice to the defendant Murray was issued, but the record contains the following acceptance of service:

"Isaac C. Evans v. J. D. O'Daniel et al. No. 240.—September 21, 1899. In County Court, Tom Green County, Texas, October Term, 1899.

"I hereby waive the issuance of a citation and accept service in the above styled and numbered cause. Witness my hand, this 22d day of September, 1899.

"L. B. MURRAY, Sheriff of Coke County, Texas."

This paper was filed October 3, 1899.

October 6, 1899, a judgment was rendered against the defendant Murray for the amount due on the judgment against O'Daniel and Thaison, with interest thereon at 8 per cent from the date of the judgment under consideration. This judgment recites that the defendant Murray made default, but also states that the court heard evidence before rendering judgment.

There is no statement of facts in the record. The defendant Murray has brought the case to this court by writ of error, and assigns numerous errors, for which a reversal is sought. Without referring to the assignments in detail, the opinion will consider and determine the principal questions presented, and those not referred to in the opinion are nevertheless decided against the plaintiff in error.

Treating this proceeding as it was treated in the court below and evidently intended by the plaintiffs in that court, as a motion against the defendant on account of his failure to execute a writ of execution, as authorized by article 2386 of the Revised Statutes, we are of opinion that the waiver and acceptance of service filed by the defendant dispensed with the issuance and service of notice of the motion, as required by that article. Conceding, as contended by counsel, that a distinction exists between a citation and the notice required by article 2386, and that the waiver of citation alone would not operate as a waiver of notice, still we think the defendant waived the statutory notice, because the instrument signed and filed by him in express terms accepts service "in the above styled and numbered cause." The pleading heretofore set out was then on file in that cause and it was the only pleading therein that asserted any right of action against the defendant Murray; and therefore the acceptance of service must be held to apply to the cause of action asserted by the pleading referred to.

The statute requires five days' notice of such a proceeding. The acceptance of service was filed only three days before judgment by default was rendered; and for this reason, it is contended that the record fails to show five days previous notice to the defendant. We think the time should be reckoned from the date of the acceptance, and so reckoning it, about twelve days elapsed before the judgment was rendered.

Several authorities have been cited in which it has been held in somewhat similar cases in this State, that such proceedings, being summary and penal in nature, should be strictly construed; and upon the doctrine referred to, it is contended that the motion against the defendant is insufficient to support the judgment. It is pointed out that the motion does not set out the return endorsed by the defendant upon the execution; that it does not in terms allege that he failed or refused to levy upon or sell any property justly liable to execution, when the same might have been done, and does not allege that he had knowledge of the existence of any such property.

If in fact, this were a proceeding to recover a penalty arbitrarily fixed by statute, without reference to the right and wrong of the transaction,

we might sustain some of these contentions. Most, if not all, of the cases cited in which the proceedings were held to be penal in nature and the rule of strict construction applied, were instituted under statutes which authorized the recovery of 10 per cent, or some other per cent imposed as a penalty, or held the officer liable for a failure to return an execution, regardless of whether or not he had or could have collected the debt from the execution debtor. In all such cases the rule referred to has application. But article 2386, under which this proceeding was instituted, renders the officer liable only when it is made to appear that he failed or refused to levy upon or sell property justly liable to execution, when the same might have been done, and his liability does not extend beyond the amount of the debt, interest and costs; and if the property which could have been levied upon was of less value than the debt, the value of the property would be the measure of liability.

In the case at bar the plaintiffs alleged that an alias execution had been issued on their judgment to Coke County, and placed in the hands of the defendant, the sheriff of said county. The pleading avers that he retained the execution about twelve days; that one of the execution debtors, at the time the defendant received the execution, had real and personal property in his possession in Coke County subject to execution, sufficient to satisfy the writ, and that defendant could have made the amount of money specified in the writ had he made the levy therein required and commanded, and that he failed and refused to execute said alias execution and returned the same not executed.

The specific relief prayed for was a judgment against the defendant for the balance due on the plaintiff's judgment against O'Daniel and Thaison, 8 per cent interest thereon, as stipulated in said judgment, and costs of suit, and it is not contended that any other relief was granted. Though the proceeding was by motion in the original suit, and under the statute referred to the cause of action set up and the relief sought were such as might have been set up and invoked in a common law action against the defendant for failure to execute the process. In one sense only the proceeding is summary—it authorizes a judgment plaintiff to proceed immediately against the defaulting officer in the court where the original judgment was rendered; but it is not summary in any other respect, and is not in any proper sense a proceeding to recover a penalty. No more can be recovered in a proceeding under the statute in question than could be recovered in a common law action. Therefore, the proceeding is not in the nature of a criminal or penal action. When the statute is analyzed, it will be seen that it merely authorizes a suit to be brought against the officer in a different form and earlier than perhaps it otherwise could be brought; and, in some instances, fixes the venue different from what it otherwise would be.

These are the only substantial differences between a proceeding under article 2386 and a common law action; and as these relate only to the form of action and the time and place of bringing the suit, they do not make a proceeding under the statute penal in its nature, nor call for

the application, in determining questions of pleading, of rules other than those that apply to ordinary litigation. In effect, this was so decided in the case of Smothers v. Field, 65 Texas, 436.

We think the pleading under consideration was good against a general demurrer, and sufficient to admit all the proof necessary to establish the liability of the defendant under article 2386.

There is no merit in the contention that the sureties on the defendant's official bond were necessary parties, and that the action can not be maintained against the defendant alone. It is true that the statute makes the sureties, as well as the defaulting officer, liable, but this is done for the benefit of the plaintiff, and he is not compelled to proceed against the sureties as well as the officer. In Poer v. Brown, 24 Texas, 34, which was a motion against the sheriff and his sureties to recover a statutory penalty, it was held that the statute authorizing suits against sureties alone, or a discontinuance as to the principal when the latter is insolvent or beyond the jurisdiction of the court, had application to the proceeding then before the court. If the right to proceed, under any circumstances, against the sureties alone can be held to exist under a statute declaring both liable, then it must be true that the party complaining can proceed against the principal alone.

We find no error in the record, and the judgment is affirmed.

Affirmed.

JAMES M. MARLIN v. ANNIE KOSMOROSKI ET AL.

Decided February 13, 1901.

1.—Agency—Execution of Conveyance.

A bond for title signed without indicating that it was done as agent, but stating in the body of the instrument that the maker acted for himself and as agent for another, shows such execution by the other through an agent as to constitute a good conveyance if ratified by the principal.

2.—Immaterial Error.

Where the execution of a conveyance by agent has been found, on sufficient evidence, to have been ratified by the principal, errors in the charge or in the rulings on evidence upon the issue of the agent's original authority are not ground for reversal.

3.—Same.

Errors in the admission of evidence become immaterial where, upon another issue, the judgment was properly rendered in favor of the right sought to be supported by such evidence.

Appeal from Falls. Tried below before H. C. Lindsey, Esq., Special Judge.

Z. I. Harlan and *Rice & Bartlett,* for appellants.

J. A. Martin and *J. W. Spivey,* for appellees.

KEY, ASSOCIATE JUSTICE.—This is an action of trespass to try title to 150 acres of land, and for partition thereof. It has been in this court before, and will be found reported in 27 Southwestern Reporter, 1042. The plaintiffs are James M. Marlin and Sallie Ann Blackwell, the latter being joined pro forma by her husband, Chas. C. Blackwell. The original defendant was John Kosmoroski, who died while the suit was pending, and his wife and children were made defendants. Upon trial a judgment was rendered awarding to the plaintiffs 18-80 of the land and to the defendants the remainder, and the plaintiff Marlin has appealed.

Certain facts were embodied in a written agreement signed by the parties and incorporated in the decree, and other facts were shown by undisputed testimony, as recited in the court's charge. The material issues upon which there was conflict in the testimony were submitted by the court to the jury in the form of special issues, and the jury made findings thereon. All of these findings were supported by testimony and are adopted by this court, together with the other facts agreed to and established by undisputed testimony, as recited in the court's charge as the basis of the judgment here rendered.

Briefly, the history of the case is this: In 1861 the land in controversy was the community property of William Bowen and his wife, Susan Ann Bowen. During that year William Bowen died, leaving five children, viz., Milton P. Bowen, William P. Bowen, Elliott Bowen, Daniel C. Bowen, and Sarah Ann Bowen. Daniel C. Bowen died in 1879, unmarried and without children. When William Bowen died, each of his five children inherited one-fifth of his half interest or 1-10 of the entire tract; and when Daniel C. Bowen died, each of the other four children inherited one-fourth of one-half of his interest, which, added to that inherited from their father, made each of the four surviving children's interest 9-80 of the whole tract. Milton P. Bowen is now dead, and left surviving him his wife, the plaintiff Sallie Ann Blackwell, and two children, Robert Lee Bowen and William D. Bowen. The latter have conveyed their interests in the land to the plaintiiff Marlin. The daughter Susan Ann Bowen married J. R. Ellis, and they have also conveyed their interest to Marlin. These two interests, Milton P. Bowen's and Susan Ann Ellis's, comprise the 18-80 awarded to the plaintiff.

Marlin also introduced in evidence deeds from the surviving wife, Susan Ann Bowen, and from William P. Bowen; and the controversy was narrowed down to these interests and the question of improvements in good faith. Prior to the time that Marlin bought from Mrs. Bowen and William P. Bowen, Elliott Bowen executed to John Kosmoroski a bond for title to the land, stating in the body thereof that he was acting for himself, and as agent for his mother, Mrs. S. A. Bowen and brother W. P. Bowen, and as guardian of William D. Bowen and Robert Lee Bowen. It was executed and filed for record in the proper county, October 30, 1882. This instrument he signed as E. Bowen, without adding after his signature anything to indicate that he was acting as either

agent or guardian. In the certificate of acknowledgment added thereto by the clerk of the County Court of Falls County, it is stated that he acknowledged that he executed the instrument for the purposes and consideration therein expressed.

The trial court held that this instrument could not affect the interests of William D. Bowen and Robert Lee Bowen, they being minors at that time and Elliott Bowen not then being their guardian, and awarded their interests in the land as the heirs of Milton Bowen, to the plaintiff Marlin. Whether or not Mrs. S. A. Bowen and William P. Bowen had authorized Elliott Bowen to sell their interests in the land, and whether or not, if they had not so authorized him, they thereafter ratified his act in so doing, were issues submitted to the jury, and they made specific findings that each had authorized Elliott Bowen to sell the land and had ratified his act in so doing.

With these facts established, the court very properly held that the defendants, as the heirs of John Kosmoroski, had the superior title to the interests of Mrs. Bowen and W. P. Bowen; and it is not disputed that they had title to Elliott Bowen's interest, and all these together make 62-80 of the tract of land.

Many, if not all, of the questions presented in appellant's brief are rendered immaterial by the finding of the jury that Mrs. Bowen and William P. Bowen ratified the execution by Elliott Bowen of the bond for title referred to. With these two facts established, it is wholly immaterial if error was committed in giving or refusing instructions on the subject of Elliott Bowen's authority to sell the land; and the same may be said in reference to rulings made concerning the admissibility of testimony on that issue. If the jury had found that neither of them authorized the sale of the land, the finding that they thereafter ratified and approved the same, would be binding on them or anyone claiming under them by a right subsequently acquired.

Also, if error was committed in admitting in evidence copies of probate records concerning the guardianship of William D. and Robert Lee Bowen, such ruling is now immaterial, because the interests owned by them were awarded to Marlin. We think the recitals in the bond for title, taken in connection with the certificate of acknowledgment, were sufficient to show that Elliott Bowen was acting for his mother and brother, as well as himself, in selling the land; and the jury having found that the mother and brother ratified his act, appellant can not be heard to complain.

We find no error in the record, and the judgment is affirmed.

Affirmed.

L. ECK AND CHAS. P. SCRIVENER v. GEORGE P. WARNER, RECEIVER.

Decided February 13, 1901.

1.—Judgment—Receiver—Intervention.

One intervening in a receivership upon a judgment of foreclosure against property in the hands of the receiver can not, in the absence of allegation of fraud or mistake in his former judgment, have the same so corrected and enlarged as to foreclose on interests in the property not affected by such first judgment.

2.—Receiver—Intervention—Foreclosure.

One who has recovered judgment with foreclosure upon the interests of defendants in property held by the receiver of a company of which they were part owners, may by intervention in the receivership case follow such property in the receiver's hands and have the question as to his superior right to it passed upon.

Appeal from Travis, Fifty-third District. Tried below before Ashby S. James, Esq., Special Judge.

John Dowell and *Wm. Brueggerhoff,* for appellant.

A. H. Graham and *D. W. Doom,* for appellee.

FISHER, CHIEF JUSTICE.—The appellants' petition of intervention, to which the court sustained general and special demurrers, in effect alleged that all the assets and property of a business concern known as the Consolidated Copper Syndicate were in the possession of one George P. Warner, a receiver properly appointed by the District Court of Travis County, and that said Warner is proceeding under proper orders of the court in the administration of the property as receiver; and that prior to the filing of this suit, on the 5th day of March, 1895, in the District Court of the Fifty-third Judicial District of the State of Texas, in a case wherein H. H. Wibert was plaintiff, and Ruth Wallace et al. were defendants, the appellants each obtained moneyed judgments against William Wallace, H. H. Wibert, and the said George P. Warner, with a foreclosure of judgment liens on the interest William Wallace and Wibert then had in all the lands belonging to the Consolidated Copper Syndicate. The petitions then proceed to allege the interests which the said Wallace and Wibert had in the lands and the assets of the concern; and alleged facts showing that the receiver Warner had in his possession purchase money, the proceeds of the sale of a part of the land of said syndicate, and had in his possession the balance of the property of the syndicate.

The appellant Eck, in his petition for intervention, also sets up a claim against the receiver for the sum of $200 with interest in favor of one A. H. Graham in the form of a judgment recovered by him against H. H. Wibert and William Wallace, with the foreclosure of a lien on the interests of Wibert and Wallace in the lands and property of the

Consolidated Copper Syndicate; and the petition also alleges that the appellant Eck was the owner of this judgment.

The petitions of both appellants also requested that the trial court reform and correct the judgments previously entered against Wibert and William Wallace, so as to create a liability against all of the other owners of the property of the Consolidated Copper Syndicate, and to foreclose the lien in favor of the appellants against all of the property in the hands of the receiver, instead of only against the interests of Wibert and Wallace. There was no fraud or mistake alleged to have been committed in procuring the former judgments, which the appellants seek to have corrected and enlarged.

As to this branch of the case, we are of the opinion that the trial court committed no error in sustaining the demurrers; but as to the interest of Wibert and Wallace in the property in the possession of the receiver, we think the court did err in holding, in effect, that the appellants had no cause of action.

The petition, in effect, alleges that all the property, which necessarily includes the interests of Wibert and Wallace, was in the possession of the receiver, and that the appellants had previously obtained judgments aginst Wibert and Wallace to which the receiver and the others interested in the property were parties, with a foreclosure of liens on the interests of Wibert and Wallace, the amount of which is set out in the petition. The petition does not upon its face disclose the fact that there are other claims prior in dignity to that of the appellants, which should be first paid and satisfied, and which if done would exhaust all of the property of the concern; but so far as anything appears to the contrary, the assets of the concern may be sufficient to satisfy the claims of creditors of a class, if any, whose claims may be entitled to priority over those of appellants and leave an amount sufficient to satisfy the claims of appellants.

If Warner has in his possession the interest of Wibert and Wallace in the property of the concern, the appellants would be entitled to follow it in the hands of the receiver, and have their superior right, if any, thereto passed upon by the court who has jurisdiction and possession of the property. 17 Am. and Eng. Enc. of Law, 2 ed., 183, 184.

If the appellants had a superior right to the interest of Wibert and Wallace in the property, and the receiver had appropriated and used that interest or still had the same in his possession, the court exercising jurisdiction over the property and receiver could compel the receiver to account for it to the appellants to the extent of their claims against Wibert and Wallace.

For the reason stated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

JULIA E. STANDLEE ET AL. v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS.

Decided February 13, 1901.

1.—Death—Damages—Habits of Deceased.

In an action for damages from injuries resulting in death, defendant may show, as tending to reduce damages, habits of drunkenness, profligacy or indifference to the welfare of his family on the part of deceased.

2.—Charge.

Special charges requested are properly refused where the same ground is sufficiently covered by the charge of the court.

3.—Same—Trespasser.

The court may instruct the jury that the injured party was a trespasser where the evidence indisputably establishes that fact.

4.—Newly Discovered Evidence.

A new trial should not be granted for newly discovered evidence which is not calculated to change the result.

Appeal from Coryell. Tried below before J. E. Walker, Esq., Special Judge.

T. C. Taylor and *M. S. Duffie,* for appellants.

S. H. West and *Clark & Bolinger,* for appellee.

FISHER, CHIEF JUSTICE.—J. W. Standlee was killed by one of the trains operated on appellee's road, and the appellants, as his surviving widow and children, brought this suit for damages.

The appellee answered by general denial, and further to the effect that the deceased was guilty of contributory negligence in placing himself at a point of danger, and sitting and lying down on the track of appellees road, and that at the time he was in an intoxicated condition.

The specific ground of negligence alleged in the plaintiffs' petition as their cause of action consists in averments to the effect that the deceased was run down and struck by the moving train, after his peril had been discovered, and at a time sufficient, by the exercise of diligence, to have prevented the collision. The verdict and judgment of the trial court were in favor of the railway company.

There is abundant evidence in the record which warrants the conclusion that the deceased when struck was a trespasser upon the track of appellee's line of road, and that he was more or less intoxicated, and that he was, when first seen by the engineer in control of the train, lying down upon or immediately adjacent to the track, at a place that was neither a public nor private crossing. That the engineer, as soon as he discovered that the object on the track was a person, immediately exercised proper diligence, by using all the appliances and means usual in such cases in bringing his train under control, in order to stop the train before reaching the deceased, and after the exercise of proper diligence

he was unable to do so; whereupon the deceased was struck by the passing train and killed.

We think the ruling of the court was proper in admitting the evidence complained of in appellants' first eight assignments of errors. All of this testimony had some bearing upon the amount of pecuniary loss, if any, sustained by the appellants by the death of the deceased. If his habits were such as to indicate that his services were of little value to his family, and that by reason of his habits and conduct he was what might be termed a worthless person, and that when viewed from a pecuniary standpoint, his existence was a burden upon instead of a benefit to his family, these facts ought to be known to the jury, so that they could determine what compensation, if any, the plaintiffs might be entitled to. In cases of this character compensation consists in the pecuniary loss sustained by the parties aggrieved; and any fact which would have a tendency to show and explain the conduct, character, and business of the deceased could and would doubtless serve some purpose in arriving at the amount of this compensation. If the conduct and habits of the deceased were of such a character as would show that his earning capacity was seriously impaired or diminished, or that in his selfishness and indifference to the interests and welfare of his family he squandered and used in pandering to his own pleasures all that he earned, those that claim to have been aggrieved by reason of his death could not consistently claim that their loss was as great as if he had been a man of exemplary habits and who applied his income and earnings to the benefit of his family.

We think the charge of the court on the measure of damages, as well as upon the other branches of the case, was sufficient.

As to the questions raised in the eleventh, twelfth, and thirteenth assignments of error, we think it sufficient to say that in our opinion the general charge was sufficient upon this subject. It was proper for the court to instruct the jury as it did, that the deceased was a trespasser. The evidence in the record indisputably established this fact.

There was no error in overruling the motion for a new trial. The grounds stated as to the newly discovered evidence of the witness Hatch were not sufficient, in our opinion, to authorize the court to grant the motion for a new trial based on that evidence. The evidence was not of a character which, if admitted, was calculated to affect the result. It was not of a character to negative the force of the testimony in the record which shows that the engineer did not discover the peril of the trespasser, and one who by his contributory negligence had placed himself in a position of danger, in time to avoid running him down.

We find no error in the record, and the judgment is affirmed.

Affirmed.

ALAMO FIRE INSURANCE COMPANY ET AL. V. A. DAVIS ET AL.

Decided February 13, 1901.

1.—Fire Insurance—Avoided by Alienation—Mortgage—Notice to Agent.

In an action on a fire insurance policy by a mortgagee secured as his interest might appear, which was made void as to the insured owner by his alienation of the property and to be avoided also as to the mortgagee on his failure, having knowledge of the alienation, to notify the insurer thereof, the issue as to its avoidance by failure to give such notice should have been left to the jury where there was evidence tending to show that the owner, at the time he alienated the property, was such agent and representative of the mortgagee as to tax the latter with knowledge of the transfer.

2.—Insurance—Mortgagee—Subrogation.

An insurance company, where the policy so provides, is entitled, on payment of the policy to a mortgagee protected as his interest should appear, when it had been avoided as to the insured owner by his alienation of the property, to be subrogated to any securities for the debt held by the mortgagee against such owner.

3.—Same—Payments by Mortgagor.

The mortgagee protected by an insurance policy as his interest might appear can recover only to the amount of his debt, and where the insured owner has made the policy void as to himself by alienation of the property, evidence is admissible, under proper pleadings, of any payments made by the mortgagor upon the debt up to the time of trial.

Error from Bell. Tried below before Hon. Jno. M. Furman.

Alexander & Thompson, for plaintiffs in error.

A. J. Harris, for defendants in error.

KEY, ASSOCIATE JUSTICE.—This suit was instituted by A. Davis, Florence I. Davis, and the Southern Home Building and Loan Association, of Atlanta, Ga., against the Alamo Fire Insurance Company and the Germania Insurance Company, upon a fire insurance policy of $1000. The defendants in their answer set up breaches of the policy growing out of: (1) the sale of the property from A. Davis to Florence I. Davis, which was prohibited by the policy; (2) the assignment of the policy before the loss, which was prohibited; (3) the taking of other insurance on the property, which was prohibited; (4) that the loan association and its trustee knew of the change in the interest and title of the property by the sale to Florence I. Davis, and neglected to notify the insurance company thereof.

The pleadings presented some other issues which we deem it unnecessary to state. After hearing the testimony the court directed a verdict against the plaintiffs A. Davis and Florence I. Davis, and in favor of the Southern Home Building and Loan Association of Atlanta, Ga., against both insurance companies for $951.60, and rendered a judgment in accordance with the verdict.

The policy sued on was issued by the Alamo Fire Insurance Company, and it was sought to hold the other company liable on account of a subsequent contract between the two companies, by which the Germania Insurance Company obligated itself to pay all the policies theretofore issued by the Alamo Fire Insurance Company. The Building and Loan Association sued as mortgagee, and the policy is payable to it as its interests may appear. The policy also contained the usual prohibitions against alienation of the property or the procurement of other insurance thereon; but stipulated that such acts on the part of A. Davis, the owner of the property, should not invalidate the policy as against the interest of the mortgagee, provided the latter notified the insurance company of such conduct on the part of the owner, if the mortgagee had knowledge thereof.

The undisputed testimony shows that after the policy was issued A. Davis transferred the property to Florence I. Davis, but there was also testimony tending to show that A. Davis was at the time such agent and representative of the building and loan association as that his knowledge of the transfer of the property would be imputed to the association, and that neither of the insurance companies was notified of such transfer.

The testimony being in this condition, we think it was error for the court not to submit the issues referred to, to the jury, and to peremptorily direct a verdict against the defendants.

The policy contained the following stipulation: "Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment or transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of their claim."

In view of this stipulation in the contract, if upon another trial the pleading and evidence shall show that the bulding and loan association held any securities for the debt owing by A. Davis, the judgment should subrogate appellants to the rights of the building and loan association to and under such securities.

We also hold that if the pleadings are so framed as to admit proof of payments made upon Davis's debt to the building and loan association after the fire occured, and even up to the time of trial, such evidence should be admitted. The association has no interest in the insurance money, except as mortgagee, and if it be shown that the other plaintiffs are not entitled to recover because of conduct on their part which renders the policy void as to them, and it be shown that the building and

loan association's debt has been paid, no judgment should be rendered against defendants, except for costs, and not for the latter, unless it appears that some portion of the mortgage debt was unpaid at the time the suit was instituted.

For the errors pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

M. A. ROSS ET AL. v. E. A. BLOUNT ET AL.

Decided February 20, 1901.

Proof of Death—Absence.

The fact that an owner of land, then thirty-five or forty years old, went to California in 1854, to work in the mines, leaving his family in Texas, and ceased to write and had not been heard from by them since the beginning of the Civil War, was not, in the absence of evidence of unsuccessful inquiry for him in California, conculsive proof that he was dead and that the land had descended to his heirs in 1900.

Appeal from Mills. Tried below before Hon. Jno. M. Furman.

J. E. Shropshire, for appellants.

Goodwin & Harrison and *Matthews & Browning,* for appellees.

FISHER, CHIEF JUSTICE.—This is an action of trespass to try title, by the appellants against the appellees, for the Archibald Thompson survey, situated in Mills County. The case was tried before the court without a jury, and judgment rendered in favor of the defendants below, appellees here.

The following is all the evidence in the record tending to establish title in appellants:

"Plaintiffs introduced the depositions and answers of plaintiff M. A. Ross, which were in substance as follows: That she was one of the plaintiffs to this suit, and was the wife of J. D. Ross, the other plaintiff herein; that her father's name was Archibald Thompson, and that her said father and mother were living in Falls County, Texas, in the early part of A. D. 1854, where they had lived for a couple of years; and in the winter or early spring of said year her said father left the State of Texas and went to the State of California, and never returned to Texas after having so left. That when he left this State he left his family, consisting of a wife and two daughters, with plaintiff's or M. A. Ross' uncle,—her mother's brother, Anthony Blythe, in Falls County, Texas. That in about one year after Thompson left plaintiff's mother died, and on April 12, A. D. 1858, Anthony Blythe, her uncle, died. That plaintiff's sister died, and she is informed that her sister's only child and heir died. That plaintiff is the sole heir of her said father, Archibald

Thompson; that said Thompson could write; that he had frequently written letters home to his family, and continued to write such letters till the commencement of the Civil war, and along about that date he ceased writing and she had never been able to hear from him since. That she knew he had not been back to Texas since he left in 1854, or he would have come to see his children. That her father always signed his full name, thus, Archibald Thompson, when he wrote. That she had not seen him write that she remembered of, but she had frequently seen letters written by him to members of the family, and she knew her father's handwriting. That two letters sent to her attorney, J. E. Shropshire, at Brady, Texas, were written by her father and signed by him. She knew this from frequently having seen his letters so signed, and from a signature of his that was written in an old hymn book that was the same which she had preserved. That she knew nothing of her father having lived in Newton County, Texas; that if he had ever lived there, or owned a ferry boat on the Sabine river, she did not remember it. That she was only 7 years old when her father left and 8 years old when her mother died. That her father had lived in Falls County, Texas, Bell County, Texas, and Harrison County, Texas, of her own knowledge or she was so informed. That she was born in Harrison County, Texas, in A. D. 1847, and in 1854 he (my father) was between 35 and 40 years old. I first learned of the existence of the Archibald Thompson survey sued for about ten years since, when I saw an answer in the Goldthwaite Mountaineer advertising some lands for sale, and among them was some lands I thought belonged to my father.

"Plaintiffs next introduced a letter from Archibald Thompson, signed by his full name, and written by said Thompson in the Cherokee Nation on December 29, A. D. 1854, to Anthony Blythe, describing his trip from Texas to Missouri with a herd of cattle, and from there back to the Cherokee Nation, I. T., where he was then waiting for an opportunity to go on to California. In it he mentioned 320 acres of land that he, Thompson, bought from Anthony Blythe's father, and authorized Blythe to sell the land and get the proceeds out for the benefit of his, Thompson's, children, and there was no other land referred to in the letter, and instructing him to manage the business as he thought best, stating that he would come and see the family, but it was 425 miles distant from where he was to them. Plaintiffs next introduced a letter of same kind and signature, headed and dated in California, Calaveras County, December 30, A. D. 1855. It described his trip, the country, etc., and stated that he, Archibald Thompson, was going to work hunting gold. He also referred to the 320 acres of land referred to in his former letter and no other land. Plaintiffs then introduced chapter 84, pages 137 to 141, inclusive, Special Laws of the State of Texas, passed by the Fifth Legislature of the State of Texas, on February 13, 1854, in which the Legislature grants one league and one labor of land to Archibold Thompson or his heirs."

The judgment of the court below can be maintained upon the ground

that the evidence of the plaintiff was not sufficient to entitle her to recover. It is clear from the testimony that she relies upon the fact that she was the sole surviving heir of her deceased father, Archibald Thompson; and it appears from the special act of the Legislature that the grant was intended as a donation to Archibald Thompson or his heirs. Such being the case, there is nothing in the record tending to negative the proposition that the land in controversy was the separate property of Archibald Thompson. The evidence shows that he moved to California about 1855; and other than the naked fact that the plaintiff had not heard from him since that time, there is nothing in the record tending to show that he is not still residing there and was alive at the time of the trial of this case.

An absence of seven years may, under certain circumstances, raise the presumption that the absent one is dead, but that presumption, under the facts in this case, does not arise. If he went to California, and, as the testimony shows, he intended to work there in the mines, that place became his residence, and in the absence of evidence tending to show that a search and inquiry was made for him there which resulted in failing to ascertain his whereabouts or whether he is alive, would not raise the presumption that he was dead.

Before the plaintiff could recover, the burden was on her to establish the death of her father. This she has not done; therefore, the judgment of the court can be affirmed upon this ground. But, however, after a careful examination of the points raised in appellants' assignments of errors, we are prepared to hold that none of them are well taken, and they present no reversible error.

There is evidence coming from the appellees, which tends to show that the grant in question was made to a different Archibald Thompson than the ancestor of the plaintiff, and the evidence further shows that the defendants hold under conveyances executed by this Archibald Thompson.

In view of the fact that we can rest the judgment upon the failure of plaintiff to establish title, we deem it unnecessary, as said before, to discuss the several assignments of errors presented by the appellants, but we are of the opinion that none of them are well taken.

We find no error in the record and the judgment is affirmed.

Affirmed.

J. C. LEAGUE v. SANGER BROTHERS ET AL.

Decided February 20, 1901.

Growing Crops—Mortgage—Landlord's Lien—Rescission.

The lien of a mortgage on crops to be raised on premises held by the mortgagor under executory sale, is superior to that created in favor of his vendor as a landlord, by a rescission of the sale and conversion of his holding into a tenancy, made after the crops were growing and the mortgage had attached to them.

Appeal from the County Court of McLennan. Tried below before Hon. J. N. Gallagher.

W. M. Sleeper, for appellant.

Boynton & Boynton, for appellees.

COLLARD, ASSOCIATE JUSTICE.—Appellant's brief correctly states the nature and result of this suit, which we adopt, as follows:

"This suit was instituted by Sanger Brothers and Isaac Burnstein, as plaintiffs, against P. H. Compton, J. L. Braswell, C. F. Lynch, and J. C. League, in the County Court of McLennan County, on the 18th day of December, 1899.

"Plaintiffs sought to recover judgment against defendant P. H. Compton on a note for $666, and also to foreclose two certain chattel mortgages on certain personal property.

"J. L. Braswell was made a party defendant on the allegation that he was in possession of a part of the personal property. C. F. Lynch was made a party defendant on the ground that he gathered and marketed certain corn and cotton included in said mortgages, and had sold the same, and had in his possession the sum of $130 as the proceeds thereof. J. C. League was made a party defendant on the ground that he claimed some right or interest in a crop of cotton and corn alleged by plaintiffs to be included in said mortgages.

"It was agreed between plaintiffs and League and Lynch that the latter should be permitted to gather and market the said crop and hold the proceeds subject to the order of some court of competent jurisdiction, and should it be determined that the plaintiffs had the superior claim to said proceeds, the same should be paid over to plaintiff, but if it was held that the said J. C. League had a superior claim, then such proceeds were to be turned over to said J. C. League.

"The cause was tried before the court without the intervention of a jury, and the court held that the plaintiffs had the superior claim to the said sum of $130 in the hands of Lynch and rendered judgment accordingly.

"J. C. League excepted to the judgment of the court, and gave notice of appeal, and filed his appeal bond in the time prescribed by law, and brings this case to this court for revision and correction."

The parties made an agreed statement of the pleading and proof which was approved by the trial court, and we adopt the same, as follows:

"1. On to wit, the 18th day of December, 1899, Isaac Sanger, Alexander Sanger, Phillip Sanger, and Sam Sanger, composing the firm of Sanger Brothers, and Isaac Burnstein, instituted suit against P. H. Compton to recover judgment against him on a note for $666, dated November 8, 1897, and due October 1, 1898, and bearing 10 per cent per annum interest from date, and providing for 10 per cent attorney's fee on the amount of said note as collection fees; the plaintiffs also sought a foreclosure on two mortgages executed by P. H. Compton to them to secure the payment of said note, and made one J. L. Braswell a party defendant, alleging that he had in his possession a portion of the alleged property. One of the mortgages set out in said petition was dated November 6, 1898, and among other things included all the crop of corn and cotton grown and to be planted or to be grown for the year 1899 on the Compton farm, about eight miles east of Waco, and all crops to be grown on said farm for and during succeeding years until said debt should be fully paid off.

"Plaintiffs alleged that after said crops were grown on said land and before the same were gathered, the said P. H. Compton turned the same over to one C. F. Lynch, who was also made a party defendant to the suit, and who gathered and marketed the crop of corn and cotton grown by said Compton on said land for the year 1899, and which was covered by plaintiff's mortgage of date November 6, 1898, and that the proceeds of the sale of said crop amounted to the sum of $130, which the said Lynch retained in his hands.

"Plaintiffs further alleged in their said petition that one J. C. League claims to have some right or interest in and to the crop of said Compton, raised on said premises for the year 1899. It was agreed by and between plaintiffs and the said League and C. F. Lynch that the latter should be permitted to gather and market said crop, and hold the proceeds derived from the sale of the same, subject to the order of some court of competent jurisdiction; that it should determine the controversy between the plaintiffs and the said League as to their rights in said crop or the proceeds derived from the sale of the same.

"Plaintiffs prayed on final hearing for a judgment of the court that said J. C. League had no right or interest in and to said crop or proceeds derived from the sale thereof in the hands of the said C. F. Lynch, and that an order be entered by the court commanding said C. F. Lynch to pay over to plaintiffs the proceeds now in his hands, amounting to $130, derived from the sale of said crop, and that plaintiffs have their judgment against said Compton for the amount of said note of $666, together with interest and attorney fees, and for foreclosure of their mortgage upon all of the property described in said petition.

"J. C. League filed his plea of intervention in said cause on the 28th day of July, 1900, wherein he set out and alleged that on the 3d day of

February, 1896, he with one C. W. Gill, being the joint owners of the tract of land described in plaintiffs' petition as the Compton farm, and on which the crop of cotton and corn was grown whereon plaintiffs seek a foreclosure of the mortgage set out in their original petition and from the sale of which crops the $130 in the hands of C. F. Lynch was derived. And that on said last named date he and said Gill sold and conveyed said land to said P. H. Compton, who paid them therefor the sum of $665 in cash and gave them his five notes, one for $500 due twelve months after date, and four for $795.44 each, due respectively twelve, twenty-four, thirty-six, forty-eight, and sixty months after date, bearing interest at 8 per cent per annum payable annually, and that by the terms of said notes, and said deed by which said land was sold to said Compton, the vendor's lien was expressly retained on said land to secure the payment of said notes; and that said Compton failed to pay the notes which became due on the 3d day of February, 1897, and the 3d day of February, 1898, and failed to pay the annual installments of interest which fell due on said dates on said notes; and that thereupon said League rescinded the contract of sale and demanded possession of said premises from said Compton; and said Compton admitted his inability to pay the balance of the purchase money due for said land and agreed to deliver the possession of the same to said League and abandon his contract to purchase said land; and thereupon said League and said Compton entered into a written agreement dated 20th day of May, 1899, whereby said League leased and rented said land to the said Compton for the year 1899, he agreeing to pay said League as rent for said land for the said year the sum of $350 payable on the 1st day of November, 1899; and to secure the payment thereof, the statutory landlord's lien was retained on all crops of every kind to be raised on said land during said year. Upon the terms of the contract, it was further agreed that should said Compton on or before January 1, 1900, pay said League all past due indebtedness on said purchase money notes, or satisfy him for said indebtedness, then the said $350 was to be applied as a credit on said purchase money notes, and said deed to remain in full force and effect; but in event he failed to do so then Compton agreed to surrender possession of said land to said League on January 1, 1900, and execute to him a release for said land, and said League should cancel and surrender said notes to said Compton.

"Said League averred that said Compton had failed to pay to him the said $350 or any part thereof, and that he had never complied with the terms of the aforesaid agreement of May 20, 1899, and that by reason of the facts hereinbefore alleged, he held the landlord's lien against the said sum of $130 in the hands of the said C. F. Lynch derived from the sale of the crops grown on said land for the year 1899, which was prior and superior to the mortgage claim of plaintiff based upon their said mortgage on said crops given by said Compton on November 6, 1898; and he prayed for a judgment foreclosing his said lien on said sum of money; for an order directing the said Lynch to pay the same

over to him, the said J. C. League. On the 28th day of July, 1900, the cause was tried before the court without the intervention of a jury upon an agreed statement made under the provisions of article 1293 of the Revised Statutes of Texas, of the evidence, as follows:

"1. That on to wit, the 3d day of February, 1896, the said J. C. League, joined by C. W. Gill, conveyed by deed to P. H. Compton a certain tract of land out of the Thos. De la Vega eleven league grant in McLennan County, Texas, situated on Tehuacana Creek, and which is the same land on which the crops of cotton and corn were grown set out in the mortgages as alleged in plaintiff's original petition, said Compton paying therefor the sum of $665 in cash, and executing to said League his five promissory notes of even date with said deed, falling due respectively twelve, twenty-four, thirty-six, forty-eight, and sixty months after date, the first note falling due twelve months after date for $500 and the others for the sum of $795.44 each, amounting in the aggregate to $3681.76, which said notes bore 8 per cent interest per annum from date, interest payable annually, and by the terms of said deed and said notes, the vendor's lien was expressly retained on said land to secure the payment of the said notes, and that said deed was duly recorded in the deed records of McLennan County shortly after the date of the same.

"2. That P. H. Compton being justly indebted to plaintiffs on the 8th day of November, 1897, in the sum of $666, which is now unsatisfied and a valid and subsisting debt, said Compton executed his promissory note in favor of plaintiffs for said amount payable October 1, 1898, bearing 10 per cent interest per annum from date, and providing for 10 per cent additional interest as an attorney's fee if placed in the hands of an attorney for collection; and on even date therewith, executed in favor of plaintiffs a mortgage to secure the payment of said note on all the crop of cotton and corn to be raised on his farm, being the property purchased as aforesaid from said League for the season of 1898, and which mortgage included certain stock and other personal property not in controversy herein, and for successive years until said indebtedness should have been fully paid, and on November 6, 1898, said indebtedness not having been paid, and said Compton still owning and residing on said premises, to further secure plaintiffs in the payment of their said debt evidenced by said note, executed a further mortgage in which he gave plaintiffs a lien on all the crop of corn and cotton to be raised and grown by him on said place, the premises purchased from said League aforesaid for the season of 1899, and for all successive years until said indebtedness shall have been fully paid; said mortgages having been duly filed and registered immediately following their execution in the chattel mortgage records of McLennan County, Texas.

"3. On to wit, the 20th day of May, 1899, P. H. Compton, in an instrument reciting his failure to pay the balance of the purchase money due said League on the aforesaid land and his inability to pay the same, entered into a contract with said League acknowledging himself to be

a tenant of said League and to hold for the future said land as such, agreeing to pay him as rent for the same for the year 1899 the sum of $350, to become due and payable on the 1st day of November, 1899, and secured by a landlord's lien on all the crops of every kind to be raised on said land for the year 1899. It being agreed further that in event that on or before the 1st day of January, 1900, said Compton shall have paid said League all past due indebtedness on said purchase money notes given as aforesaid, or satisfied him, the said League, for the said indebtedness, then the said sum of $350 was to be applied on said purchase money notes, and the said deed to said land to remain in full force and effect; but in the event of failure on the part of said Compton to pay past due indebtedness on the said purchase money of the said land, or to satisfy said League therefor, on or before the 1st day of January, 1900, then said Compton agreed to surrender possession of said land to said League on January 1, 1900, and execute to him releases for said land, and said League should then cancel and surrender to said Compton the notes given by him as a part of the purchase money for the said land. This agreement and contract by and between Compton and League has never been put of record. Plaintiffs had no notice whatever of the fact that P. H. Compton had made default in his payments to League of the notes mentioned in said deed until up to or about October 14, 1899, or of League having elected to rescind his contract of sale to Compton. All the crop of corn and cotton raised for the season of 1899 on said premises was planted and growing at the time of the execution by said Compton of the contract above referred to with said League.

"4. On or about September 15, 1899, P. H. Compton left the premises purchased by him from the said League, as aforesaid, and on which was growing the crop of corn and cotton on which he had given a mortgage to plaintiffs of date November 6, 1898, above referred to, and authorized one C. F. Lynch to gather and market said crop of corn and cotton grown on said premises for the season of 1899, and never paid League the said sum of $350 mentioned in the contract of May 20, 1899.

"5. That the note of Compton to League for the land, which fell due on November 3, 1897, for $500, and the annual interest on the other notes, was not paid on said notes on said date, but $400 was paid on account thereof to said League, who agreed to wait until February 3, 1898, for the balance. That on February 3, 1898, Compton failed to pay any further sum on said notes, and never did pay any further sum on said notes, and never did pay any more on said notes to said League.

"6. That plaintiffs claimed said crop of corn and cotton under and by virtue of the said mortgages, and said J. C. League contended for the same under and by virtue of his contract with said Compton of date May 20, 1899, to which reference has above been made; and on October 14, 1899, plaintiffs, said League and C. F. Lynch, entered into a written agreement to the effect that said C. F. Lynch should be permitted to market and gather said crop of corn and cotton and hold the proceeds derived from the sale of the same, after deducting the necessary costs

incident to the gathering and marketing of said crop, subject to the order of some court of competent jurisdiction that should determine the controversy by and between plaintiffs and said League as to their rights in said crop or the proceeds derived from the sale of the same, in the event they were unable to adjust such matters without resort to legal proceedings. That Compton never performed the contract of purchase, and surrendered possession to said League on or about January 1, 1900; that said Lynch gathered and disposed of said crop in accordance with the above agreement, and after deducting all necessary expenses incident to the gathering and marketing of the same, has now on hand, which he holds subject to the order of the court, the sum of $130.

"7. That the sole matter in controversy between plaintiffs and said League, and which they submit to the court and ask its determination, is the question as to which of said parties is entitled to the prior claim on said crop and the proceeds in the hands of C. F. Lynch derived from the sale of such crop in accordance with the terms of the agreement entered into by and between plaintiffs and the said League, to which reference is above made.

"Plaintiffs seek to foreclose their mortgages against P. H. Compton and J. L. Braswell on all property mentioned in their mortgages and the judgment of the court in this cause.

"We agree that the foregoing is a true and correct statement of the pleading and proof as presented upon the trial of the cause of Sanger Brothers et al. v. P. H. Compton et al., No. 4743, in the County Court of McLennan County, Texas."

Opinion.—It will be noticed that Compton's purchase from League, by the terms of the rescission, was not to take effect until January 1, 1900, when the crops were mature, and that he, Compton, abandoned the premises September 15, 1899. This conditional rescission of the sale by which he was to become tenant of League was not executed until the 20th day of May, 1899, to take effect in the future, if at all. The facts show that when it did take effect the mortgages of plaintiffs, duly registered at their dates, had already applied to the crops. League was Compton's vendor, and as such, while that relation continued, had no lien on the crops,—his lien being on the land only. These conditions and facts gave plaintiffs a valid mortgage on the crops, subsisting and in effect at the time the rescission of the sale of the land and the change of Compton from a vendee to a tenant became operative. Therefore it must be held that plaintiffs' lien was superior to that of League, as it could not be postponed to the subsequent lien of League as a landlord. A chattel mortgage on crops to be subsequently raised is valid in equity. Richardson v. Washington, 88 Texas, 344, et seq. The crops in the case before us were in existence, and plaintiffs' mortgages had applied to them before the relation of landlord and tenant between League and Compton had any existence. This being true, the mortgages of plaintiffs were prior and superior to the landlord's lien, created in toto after plaintiffs'

liens by mortgages had attached to the property then in esse. We do not hold that a vendee owing the purchase money could not in any case rescind the sale of land with his vendor and become a tenant, so as to defeat a mortgage to another on future crops. It is not necessary to so hold in this case to give plaintiffs' mortgages priority, as will be seen from the facts, the mortgages having applied before there was in fact a landlord and tenant relation.

We find no error in the judgment of the lower court, and it is affirmed.

Affirmed.

S. R. SCOTT ET AL. v. CITY OF MARLIN ET AL.

Decided February 27, 1901.

1.—Boundaries—City Street—Vendor and Purchaser.

The purchasers of city property bounded by streets were concluded by the previous acts of their vendor in exchanging with the city a strip upon one side of the block for a similar strip of the street on the opposite side, widening one street and narrowing the other, where they bought with knowledge and after the new boundaries had been marked by inclosures.

2.—City—Power to Alter Street.

Under article 419, Revised Statutes, a city has power to alter the width of streets by exchanging with property owners so as to narrow one and widen another, provided the street so narrowed is not left inadequate for public accommodation.

3.—Same—Limitation.

Article 3351, Revised Statutes, does not prevent limitation running in favor of one inclosing a part of a public street in pursuance of an exchange of property with the city for the purpose of altering streets under article 419.

4.—Cross-Assignment of Error—Brief.

When the record contains no cross-assignment of error by appellee and his brief presenting it is not shown by the clerk's certificate to have been filed in the trial court, it will not be considered.

Appeal from Falls. Tried below before J. E. Boynton, Esq., Special Judge.

S. R. Scott, Z. I. Harlan, and *Martin & Eddins,* for appellants.

E. T. Johnson, A. T. Gordon, Geo. H. Carter, and *Rice & Bartlett,* for appellees.

KEY, ASSOCIATE JUSTICE.—S. R. Scott and wife, Mrs. Sallie Ward, T. S. Clark, J. M. Kennedy, W. T. Fannin, and W. F. Fannin brought this suit against the city of Marlin, Mrs. Fannie Horne, Narcissa McNeese and her husband, M. A. McNeese, and Priscilla Laird and her husband Tony Laird, to compel the removal of obstructions from an alleged street in the city of Marlin. There was a nonjury trial resulting in favor of all the defendants against all the plaintiffs except S. R. Scott

and wife. As to the latter, judgment was rendered in their favor against the defendants McNeese and Laird, but as between the Scotts and Mrs. Horne, judgment was rendered for the latter. All the plaintiffs have appealed.

There is no statement of facts in the record. The district judge filed conclusions of fact and law, and the former are adopted by this court as the basis of the judgment here rendered. On the facts found the trial court held, as a matter of law, that the street referred to was not a public street in the sense that it was a highway, and that the rights of the parties should be determined by the rules of law applicable to vendor and vendee. We do not hold that this ruling was wrong, but if it was, we are still of the opinion that the proper judgment was rendered.

As to the plaintiffs Clark, Kennedy, Fannin, and Fannin, the court properly held that they were concluded by the acts and conduct of their vendor E. C. Stewart in exchanging with the city of Marlin a strip thirty feet wide off the west end of the lots claimed by them for a strip the same width on the east, and comprising a part of what is claimed to be the street in controversy. This exchange does not appear to have been made by ordinance or resolution entered of record by the city council, but it does appear that the city authorities accepted the strip of land on the west and widened Perry street and acquiesced in the conduct of Stewart in inclosing the strip now in controversy on the east. We think Stewart's vendees, purchasing with a knowledge of the change referred to, are bound thereby.

Inasmuch as the court rendered judgment in behalf of Scott and wife, compelling the defendants McNeese and Laird to remove the obstructions placed by them in the street, the other plaintiffs are not entitled to have the case reversed. The decree compels McNeese and Laird to do all that any of the plaintiffs sought to have them do; and such being the case, none of the plaintiffs have any right to complain of that part of the decree, unless it be in reference to the costs, and no complaint is made on that score.

As to Mrs. Horne, the court held that she had established her defense of limitation as against all of the plaintiffs. It appears that more than five years before the suit was brought the mayor of the city of Marlin, acting under instructions from the city council, conveyed thirty feet by twenty feet of the alleged street to one Hunnycut, and Mrs. Horne holds under Hunnycut, by deed from him. She and Hunnycut have had this strip inclosed and in possession since March, 1888, under recorded deeds accompanied by payment of taxes, and have title thereto by limitation, unless it is part of the public street and reserved from the statute of limitation by article 3351 of the Revised Statutes. But if it be conceded that the article referred to has application, and the statute of limitation does not apply, we are still of the opinion that the judgment should be affirmed. The record shows that the city of Marlin, in 1875, adopted the general laws of 1875 for the incorporation of cities of more than a thousand population, which now comprise title 18 of the Revised

Statutes. Of these statutes, article 419 confers upon city councils exclusive control and power over public streets, alleys, public grounds, and highways, and authorizes such councils to open, alter, widen, extend, establish, regulate, grade, clean, and otherwise improve streets. The power there conferred, and especially the power to alter streets, must be held to authorize a city council to curtail the width of a street.

Appellants contend that the street in question, as originally dedicated, was sixty feet in width, and that the city council was without authority to dispose of half the street and thereby diminish its width to thirty feet. We think otherwise, and hold that under the statute referred to conferring the power to alter streets, the city council had the power, if in its discretion it saw proper so to do, to curtail the width of the street by abandonment or otherwise, as against the rights of all persons except those owning property abutting upon the land so abandoned, and so long as a street is left not shown to be inadequate for the accommodation of the public.

In the case at bar, while it is shown that it will enhance the value of appellants' property for the street to be opened and maintained to the width of sixty feet, it is not shown that thirty feet in width is not sufficient to accommodate those who desire to use the street, and none of the appellants own property adjoining the strip conveyed to Hunnycut and held by Mrs. Horne. The case of Wootters v. Crockett, 11 Texas Civil Appeals, 174, 33 Southwestern Reporter, 394, decided by the Court of Civil Appeals for the First District and in which the Supreme Court refused a writ of error, construes the statute referred to, and supports the views announced in this opinion.

Appellees present a counter-assignment in their brief, complaining of the action of the court in rendering judgment against appellees McNeese and Laird. This assignment is not embraced in the transcript; and as there is no certificate of the clerk of the court below upon any copy of the briefs filed by appellees in this court showing that a copy was filed in the trial court, as required by rule 101, the cross-assignment is not presented in such manner as to authorize this court to consider it.

No reversible error having been pointed out, the judgment will be affirmed.

Affirmed.

Writ of error refused.

FRANKLIN INSURANCE COMPANY v. MRS. SWEETIE VILLENEUVE.

Decided February 27. 1901.

1.—Life Insurance—False Representations—Incontestable Policy.

A life insurance policy containing the clause, "If the terms of this contract be complied with, it shall be incontestable after one year from its date," was not, after the expiration of that time, rendered void by the fact that the insured in his application had made false statements as to his habits of temperance and previous applications for insurance, and had warranted their truth.

2.—Same—Compromise—Fraud.

The effect of the "incontestable" clause in such policy upon its avoidance by false warranties in the application was not so clear as to make the statement of an agent of the insurance company to the beneficiary that the policy was avoided by their falsity, whereby a compromise of the claim with the beneficiary was effected, other than a mere opinion of the agent, which he might have honestly held, as to matter of law, upon which, as he occupied an adverse and not a fiduciary relation, the beneficiary had no right to rely, and which was not sufficient to avoid the compromise for fraud.

3.—Same—Consideration.

Unless the contention that the policy was void was made in good faith, the settlement, by payment of a less sum for a liquidated obligation, was without consideration as a release of the balance of the debt, and the question of its validity, dependent on such good faith, should have been left to the jury.

4.—Insurance—Penalty for Refusal to Pay—Interstate Law.

The statute providing a penalty of 12 per cent, etc., for refusal by a life insurance company to pay the amount of the policy (Revised Statutes, article 3071) applies to policies issued by all such companies permitted to do business in the State, though the policy be made payable at the home office in another State which has no such law.

5.—Same—Partial Payment.

Where part of the amount insured has been paid before suit the penalty provided (Revised Statutes, article 3071) should be 12 per cent on the balance unpaid and reasonable attorney's fees thereon.

Appeal from Travis, Fifty-third District. Tried below before Hon. F. G. Morris.

Fiset & Miller, for appellant.

Hogg & Robertson, for appellee.

FISHER, CHIEF JUSTICE.—This is a suit by Mrs. Villeneuve against the appellant on a policy of insurance issued on the life of her husband for the sum of $5000. It is admitted that $3900 was paid her by the insurance company on the policy. The suit is for a balance due of $1100, for which she asks judgment, together with 12 per cent penalty and reasonable attorney's fees allowed by the statutes of this State.

The appellant in its answer pleaded that it had paid the plaintiff $3900 as a compromise and settlement in full of her demand against the company, for which she executed her receipt releasing the company from further liability. Also that the policy was void by breach of cer-

tain warranties contained therein, wherein the assured in effect represented that he had never procured or applied for a policy of life insurance in any other company and been refused or rejected; and that he represented that he was of temperate habits and did not use intoxicating drinks to excess. These representations are alleged to be false, wherefore it is claimed that the policy was void.

In response to the claim for the penalty and attorney's fees the company pleaded that the contract of insurance was to be performed in the State of Illinois, where the company had its home office, and that there was no statute of that State authorizing the recovery of the 12 per cent penalty and attorney's fees.

In response to this defense, the appellee sought to avoid the settlement and compromise on the ground that the settlement and the receipt executed therefor was procured by reason of the fraudulent representations of the agent of the company who negotiated with her the compromise, the allegations of fraud being to the effect that she was induced to make the settlement and execute the receipt by reason of representations made by the agent that the policy was void, in that her husband had made false statements as to his habits of drinking intoxicating liquors, and as to his not making efforts to obtain insurance in other companies. It is alleged that the policy was not void, by reason of the fact that it contained a provision which made it incontestable one year after its date; that her husband did not die within the one year from its date; and in substance it was alleged that this provision was, in effect, in force when the representations were made by the agent of the company; that the agent knew that the policy contained the incontestable clause, and knew that the statements made by him at the time were not true, and that they were falsely made for the purpose of procuring the compromise settlement; that she relied upon the representations and believed them true when she accepted the $3900 in payment in full; that she had not read the policy and did not know that it contained the clause making it incontestable. She further sought to avoid the settlement on the ground that it was without consideration; that the acceptance of a less amount than the whole amount due was not based upon any new consideration, and was therefore not an accord and satisfaction of the new policy.

The court in trying the case submitted to the jury only the issue of fraud in procuring the compromise settlement. Verdict thereon was rendered in favor of the appellee for $1100. The court sustained demurrers to that branch of the plaintiff's case which sought to set aside the settlement on the ground of want of consideration, and held that the statutes of this State allowing the recovery of the penalty were not applicable, as the laws of Illinois applied to the execution and performance of the contract sued upon.

We find the following facts: That on the 29th day of March, 1898, the appellant issued the policy sued upon, for the sum of $5000, on the life of Celestin Villeneuve, payable to his wife, Mrs. Sweetie Villeneuve,

as beneficiary. He died on May 12, 1899, and satisfactory proof thereof was made by the appellee and received by the appellant. As a part of the contract of insurance, the assured represented and stated in effect that he was a man of temperate habits, and that he had not applied for insurance upon his life in other companies and been rejected. These statements were warranted to be true, and in the event they were false it was agreed that the policy should become void. We find that the statement concerning the application for insurance in other companies was false, and, but for the following provision contained in the policy, this false statement would have rendered the entire policy void: "If the terms of this contract be complied with, it shall be incontestable after one year from its date."

The compromise settlement pleaded by appellant was made October 6, 1899, upon which occasion the appellee executed the following receipt and release:

"Dated at Austin, Texas, Oct. 6, 1899.

"Received of the Franklin Life Association, of Springfield, Ill., four thousand dollars in full of all claims under and to the within certificate of membership number 21,969, on the life of the late Celestin Villeneuve, and hereby surrender all my right, title and interest under and to the same, and releasing said association from all liability; also warranting and defending said payment against any and all claimants whatsoever.

"MRS. SWEETIE VILLENEUVE. [Seal.]

"Attest before: W. W. Harris, H. Clausen."

The receipt states that she received the sum of $4000 from the appellant as settlement in full of the entire policy, but we find, as a matter of fact, that she only received the sum of $3900. The compromise settlement was made and this receipt was executed by the appellee based upon the representations made by the agent of the company, who then and there had the power and authority to represent the company in negotiating the settlement, to the effect that the entire policy was void by reason of the fact that her deceased husband had made false statements, as above set out, concerning his habits of temperance and not making an effort to procure a policy in other companies. At the time these representations were made the agent of appellant knew that the policy contained the incontestable clause as above set out. He, at the time, was representing the company and occupied towards the appellee no confidential or fiduciary relationship. The appellee, at the time these representations were made and the settlement effected, relied upon these representations and believed they were true, and had no actual knowledge that the policy contained the incontestable clause.

We also find that the home office of the insurance company is in the State of Illinois, and that there is a provision of the contract that makes the policy payable there, and that there is no statute of that State similar

to ours allowing the recovery of the penalty and attorney's fees sued for by the appellee in this case. We further find, from statements contained in the application for the policy and from indorsements on the policy, that it was issued to Celestin Villeneuve, a resident of Austin, Texas. These are all of the facts upon which we deem it necessary to make any finding.

Appellant's first assignment of error is to the effect that, as to the issue of fraud, the court, after being so requested, erred in not peremptorily instructing the jury to return a verdict in its favor. In our opinion, in view of the evidence and findings of facts upon this subject, this assignment is well taken. The representations of the agent of the appellant to the effect that the policy was void could be regarded as nothing more than his opinion as to the legal effect of the policy. The fact upon which he based that opinion was true, that is, that the assured had been rejected by another insurance company, and, but for the incontestable clause, would have rendered the policy void. The agent stated to the appellee that the false statements made by the husband were the facts that rendered the policy void. The agent having told the truth about the falsity of the statements made by the husband, brings the question to the point as to what effect these false statements would have upon the life of the policy, and what construction would the law place upon the policy, and what effect should be given to it when applied to the facts. He made no statement as to the contents of the policy to the effect that it did or did not contain any particular clause; nor were his statements of such a character as to lull an inquiry by her into its contents. The broad statement was made that the policy was void, based upon facts found to be true, which would have avoided it but for the construction and effect that the law gives to the incontestable clause. His statement that the policy was void was simply the expression of his opinion as to its legal effect, which she was not justified in relying upon, as it came from her adversary and from one who occupied towards her no confidential or fiduciary relationship.

The incontestable clause which the policy contains, and which kept it alive and relieved it from the force and effect of the false statement made by the assured, is not clear in its terms and its meaning is somewhat doubtful; but it was in effect construed by the trial court to mean that it rendered the policy incontestable on the ground upon which it is assailed by the appellant. This construction was evidently based upon the well known rule, which is established in this State, to the effect that where the meaning of a clause in a policy is doubtful and uncertain, if susceptible of a construction that will preserve the life of the policy, it will be given that effect; and for this reason we think that the trial court was correct in the construction placed upon this provision of the policy. But is was a subject upon which the agent of the insurance company might well entertain a doubt, and he might have honestly entertained the opinion that he gave. He did not, at the time that these representations were made, occupy towards the appellee any fidu-

ciary relationship, but he was representing his company, whose interest was antagonistic to that of the beneficiary.

In the absence of the existence of facts from which a fiduciary relationship would spring or of a nature reasonably calculated to excite the confidence of one as to the statements and representations of another concerning expressions of opinion relative to legal questions, authoritative instances can not be found in which a court of equity has granted relief from engagements entered into based upon such expressions of opinion. Expressions of opinion concerning a matter of law or the legal effect of a transaction have been the basis for relief extended in many instances, but in all of the well considered cases upon this subject that we have examined it has been found that the circumstances and the situation of the parties were such in their relationship towards each other as would justify one in relying upon the opinion of the other. Nothing of this character can be found to exist in this case.

But for the cross-assignments of errors presented by appellee we would reverse and render judgment here in favor of the appellant. One of these assignments is to the effect that the court erred in not retaining in the case the issue as to whether or not there was any consideration for the compromise settlement, and in not submitting that issue to the jury. We think this assignment is well taken, and the court should have submitted to the jury the question raised. When a claim is based upon a liquidated demand, and the amount due is definite and certain, and there exists no grounds for a bona fide dispute or controversy as to the legality of the claim or the amount due, acceptance and payment of less than the entire sum, in the absence of some new consideration, is not an entire accord and satisfaction, and a receipt or release in full of the balance due is without consideration. Fire Insurance Assn. v. Wickham, 141 U. S., 577; Fitch v. Sutton, 5 East., 230; Cumber v. Wayne, 1 Smith Lead. Cas., 607, and notes. But if the one who is sought to be held liable in good faith urges a defense which he believes to be substantial, and which he claims will defeat the demand in whole or in part, and in good faith raises a controversy and dispute as to his liability, a settlement and compromise of the demand based upon such contention will not be disturbed. United States v. Child, 12 Wall., 245; Farmers Bank v. Blair, 44 Barb., 653; Boffinger v. Tuyes, 120 U. S., 198. The rule upon this subject which we approve is fully discussed in Farmers Bank v. Blair, supra. On the other hand, if the contention is not in good faith, but is simulated for the purpose of forcing a compromise or of escaping liability for the entire amount due, he will be held liable for the full amount of the claim, and the release or receipt will not operate to defeat recovery. In such a case the test is, not whether the defendant was correct in his contention in that he really had a legal or equitable defense to the claim in whole or in part, but consists in the fact that he in good faith urged or asserted a defense which he really believed was substantial. 44 Barb., supra. This being true, the question becomes one of fact to be submitted to the jury

whether the dispute was urged in good faith or was simulated for the purpose of escaping liability in whole or in part.

This view leads to the conclusion that the trial court erred in refusing to retain this issue in the case, and in not submitting it to the jury.

If the jury should find in favor of the appellee on the issue just discussed, then we are of the opinion that the statutes of this State which authorize the recovery of the 12 per cent penalty and reasonable attorney's fees should be given application. The 12 per cent so sought to be recovered should not extend to the entire amount of the policy, but should be only upon that part of it that was not paid. In our opinion, it was evidently the purpose of the statute that confers this right to apply to all insurance companies that are permitted to enter this State and do business here which would be liable and subject to be sued here upon their contracts of insurance. A foreign insurance company entering this State for the purpose of doing business and subjecting itself to the jurisdiction of the courts here, would stand in the same attitude as a domestic concern, and the provisions of the law that apply to one would equally apply to the other. When it obtained a permit to do business here and entered the State for that purpose it impliedly accepted the provisions of the law that related to the liability of insurance companies. This subject is fully discussed in the cases of Life Association v. Yoakum, 98 Federal Reporter, 251, and Cravens v. Life Insurance Company, 50 Southwestern Reporter, 519; especially in the latter case, and without a further extended discussion of this question, we approve of the reasons given by the court in the last case cited.

Our views upon this subject may be also maintained upon what is said by the Supreme Court of the United States in the recent case of the Waters Pierce Oil Company v. State of Texas.

Although we are of the opinion that the trial court should have peremptorily instructed the jury to return a verdict in appellant's favor on the issue of fraud, still we leave that question open to be disposed of by the trial court in another trial, if there should be one, of the case, with the instruction, however, that if the evidence should upon the issue of fraud be substantially the same as that now contained in the record, to instruct the jury in favor of appellant as to this issue.

As to the other branch of the case, that is, the failure of the court to submit the issue that attacks the compromise settlement on the ground that it was without consideration and for failure to apply the statutes of this State with reference to the penalty and attorney's fees, the judgment will be reversed and the cause remanded. The costs of this appeal will be taxed against the appellee.

Judgment reversed and cause remanded.

W. W. EVANS ET AL. v. C. J. DANIEL ET AL.

Decided February 27, 1901.

1.—Homestead—Vendor's Lien Note—Notice.

The owner of a homestead exchanged it for an undivided interest in other improved land but executed notes apparently, but not in fact, given for and secured by vendor's lien on the land so acquired, which notes a purchaser bought, with knowledge of this fact, before the new property was occupied by their maker. On the issue of the right to restrain a sale of the land to satisfy the lien, on the ground that it was homestead, the holder of the notes was entitled to an instruction protecting him in his lien as an innocent purchaser if he bought without notice of or outward act manifesting the maker's intention to occupy the land as homestead.

2.—Judgment by Default—Res Judicata.

A judgment by default on a vendor's lien note was conclusive as to the amount of the debt in a subsequent action between the parties involving the validity of the lien as against a claim of homestead rights.

3.—Homestead—Designation—Intention.

Though one claiming homestead rights had not taken possession of the land at the time the lien sought to be enforced against it attached, his intention to do so, if known to the person acquiring the lien, entitled him to the exemption, where the property was already improved and capable of being a residence, this circumstance distinguishing the case from West End Town Company v. Grigg, 56 Southwestern Reporter, 49.

4.—Same—Husband and Wife.

The husband alone has the right to designate the homestead, and the intention which will entitle to claim the exemption in the absence of actual occupancy must be his, and not that of the wife.

Appeal from McLennan, Nineteenth District. Tried below before Hon. Marshall Surratt.

Jones & Sleeper and *H. N. Atkinson,* for appellants.

Boynton & Boynton and *S. E. Stratton,* for appellees.

KEY, ASSOCIATE JUSTICE.—Appellees C. J. Daniel and wife brought this action against W. W. Evans, Charles Evans, and J. W. Baker to restrain the sale of 140 acres of land, alleged to be the plaintiff's homestead. Baker was sued as sheriff, and the other parties as asserting a contract lien on the alleged homestead. A judgment was rendered for the plaintiffs, and the defendants Evans have appealed.

Daniel and his wife owned a homestead consisting of 121 acres of land, incumbered by a valid lien of $2500. Daniel made a verbal contract with J. E. Parker to exchange his homestead for an undivided interest of 140 acres in a tract of 297 acres of land, Parker assuming the payment of the $2500 incumbrance on the Daniel homestead. Subsequently Parker and other co-owners conveyed the undivided 140 acres of land to C. J. Daniel, and C. J. Daniel and his wife conveyed the 121 acres of land to Parker. At the same time, C. J. Daniel executed two promissory notes, payable to the order of J. E. Parker, each bearing interest at 10

per cent per annum, one for the sum of $2000 payable three years from date; and the other for the sum of $1513.55 payable four years from date, and each reciting that it was given in part payment for the 140 acres of land. The deed from Parker to Daniel recited the execution of these two notes as part of the consideration for the land, and expressly reserved a lien thereon to secure the payment of the notes. At the same time, and as part of the same transaction, Parker indorsed the notes without recourse, and they were delivered by Daniel to the defendants W. W. and Charles Evans. As a matter of fact, the notes were not given for any part of the consideration for the 140 acres of land, nor for any other consideration coming from Parker; and W. W. and Charles Evans had notice of that fact when they obtained the notes. There is conflict in the evidence as to how and for what purpose the defendants obtained the notes; but there is testimony tending to show that they purchased the $2000 note, paying therefor the sum of $2000, and took the other note as collateral security for the $2000 note. The money so obtained on the notes was not used for the purpose of rendering the land available as a homestead, nor for any other purpose connected with the land. At the time in question, the plaintiffs were not in possession of the 140 acres of land so acquired from Parker, but they submitted testimony tending to show that they had no other homestead; that they acquired the land in question intending it as their homestead. They did not take possession of it until about four years after they bought it, but submitted testimony tending to excuse themselves for not doing so. They bought it in December, 1895, but it had already been leased for the year 1895. The most of the entire 297-acre tract, of which the 140 acres in question was part, was in cultivation, but had only one small house upon it. It was not divided between the plaintiffs and their cotenants until the winter of 1898 and 1899; and thereafter Daniel built a house on the 140 acres set aside to him in the partition, moved into it, and occupied the land ever since as a homestead. However, the house was built and occupancy commenced after this suit was brought.

There was some other testimony tending to explain why appellees did not take possession of the land sooner. Among other defenses interposed by appellants, the Evanses, was that of innocent holders of the notes referred to.

We sustain the assignment of error complaining of the action of the court in refusing appellants' special charge instructing the jury that if the notes were transferred to appellants and appellees had not occupied the property as a home, nor done any outward act in reference thereto manifesting their intent to do so, and if when appellants acquired the notes they had no notice of appellees' intention to occupy the land as a home, the jury should find for defendants on the homestead issue. There is no dispute in the evidence that at the time the Evanses acquired the notes appellees had not taken possession of the 140 acres of land, nor done any outward act manifesting their purpose to do so, and whether or not the Evanses had notice of appellees' intention as testified to by

them of making the property their homestead, was a question upon which the testimony was in conflict. Appellee C. J. Daniel testified that W. W. Evans knew of his intention to use the land as a home; that he talked to him about it. W. W. Evans contradicted Daniel's statement, and testified that he never heard, until this suit was brought, that Daniel and his wife claimed the land in controversy as a home. He also testified that he bought the $2000 note, paying therefor the sum of $2000, which he held for investment, as the agent of his brother and coappellant, Charles Evans, and that he took the other note as collateral security for the $2000 note. This evidence, in connection with the facts already referred to, raised the issue of innocent purchaser of the notes, and the court erred in refusing the special instruction asked upon that subject. Love v. Breedlove, 75 Texas, 652; Heidenheimer v. Stewart, 65 Texas, 323.

We also think that the court erred in not holding that the former judgment by default against C. J. Daniel was conclusive as to the amount of his indebtedness to Evans. Under the facts disclosed by the record, we think that the court had the power to render that judgment, and no sufficient reason is made to appear for not holding it to be binding upon the parties thereto.

In reference to the question of homestead, presented under several assignments of error, our conclusion is that the court committed no error in refusing special charges numbers 2 and 7 requested by appellants. These charges, in substance, announced the proposition of law that as appellees had not taken possession of the land in controversy at the time the notes were executed, the lien reserved in the notes was valid, notwithstanding the defense of homestead now asserted by appellees. The case of West End Town Co. v. Grigg, 93 Texas, 451, 56 Southwestern Reporter, 49, is particularly relied upon by appellants in support of their contention. As presented in the record, we do not think this case entirely analogous to the Grigg case. In our opinion, if N. C. Daniel intended at the time he acquired the land to make it his homestead, and if it was then in a condition to be occupied by him as a homestead without any further improvements being made thereon, and if he can give a reasonably satisfactory excuse for not having taken possession of it earlier. and show that he has in fact taken possession of it as a homestead and that his intention to do so continued from the time he acquired it until he took such possession, then it was his homestead from the very moment the title vested in him; and being homestead at that time, no lien could then be created upon it by contract then or subsequently made, except for purchase money or improvements. In the Grigg case at the time the lien was created the property was unimproved and could not be used as a home, and the mere intention to thereafter improve it and use it as a home did not make it homestead at that time.

We think it would have been proper to have instructed the jury as requested in appellants' sixth special charge, that the husband alone has the right to designate the homestead, and that unless the husband intends to

use the property as a homestead it will not be such, although it may be the expectation and intention of the wife that the property should become homestead.

On the other questions presented we rule against appellants, but for the errors pointed out the judgment will be reversed and the cause remanded.

Reversed and remanded.

FOURTH DISTRICT, 1901.

H. GOLDSTEIN v. SHERMAN, SHREVEPORT & SOUTHERN RAILWAY COMPANY.

Decided February 2, 1901.

Connecting Carriers—Interstate Shipment—Liability of Connecting Line.

Where there is an interstate shipment of goods from another State to a point in Texas over several connecting lines of railway, with a stipulation in the contract of shipment limiting the liability of the carriers to damages occurring on their respective lines, and the goods are lost before they come into this State and before reaching the last connecting carrier, the latter is not liable therefor; and article 331a of the Revised Statutes (the connecting carriers' act of 1895), fixing the liability of connecting carriers for a through shipment of goods between points in this State, has no application.

Appeal from Marion. Tried below before Hon. T. M. Talbot.

Geo. T. Todd, for appellant.

L. S. Schluter, for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by appellant against the appellee in the Justice Court to recover the value of certain goods shipped from Chicago, Illinois, to Jefferson, Texas, and consigned to appellant. In the Justice Court judgment was had by the plaintiff, but upon appeal to the District Court the defendant obtained judgment.

The trial court, before whom the case was tried without a jury, found the following facts: (1) That the shipment of goods, including the bale lost, was an interstate shipment. (2) That the goods were delivered by plaintiff's wife to the Chicago, Burlington & Quincy Railway Company at Chicago, Illinois, on or about September 2, 1899, and that the shipment included three boxes, and one bale of clothing. (3) That the bale of clothing was never received by appellee, nor ever delivered to or received by the Missouri, Kansas & Texas Railway Company of Texas; that said bale was short at Ray, the transfer station of the Missouri, Kansas

& Texas Railway and the Missouri, Kansas & Texas Railway of Texas, near the State line; and that said bale was short at Greenville. (4) That said bale was lost before the shipment reached the State of Texas, the same having been handled by three different roads before it reached appellee.

In explanation of these findings, we will say that the evidence shows that the Chicago, Burlington & Quincy Railway Company (the initial carrier) connects with the Missouri, Kansas & Texas Railway Company at Hannibal, Mo.; that the latter connects with the Missouri, Kansas & Texas Railway Company of Texas at Ray, in Grayson County, Texas, just inside the State, and that the Missouri, Kansas & Texas Railway of Texas connects with the appellee's road at Greenville, Hunt County, Texas. The bill of lading contained a stipulation limiting the liability of the connecting carriers to their respective lines of road.

The findings of the trial judge are fully sustained by the evidence in the record. It is too plain for argument that article 331a, Revised Statutes, has no application to the character of shipment disclosed by the evidence in this case. It is equally clear that no other judgment than the one appealed from could be lawfully rendered upon the evidence disclosed by the record. Therefore, it is affirmed.

Affirmed.

SUPREME TENT OF THE KNIGHTS OF THE MACCABEES OF THE WORLD V. JAMES M. COX.

Decided February 6, 1901.

1.—Pleading—Amendment—Allegation of Damages.

A trial amendment is properly allowed which simply alleges the breach of the contract declared on in the original petition, and avers as damages for such breach the highest sum recoverable under the contract.

2.—Same—New Cause of Action.

Where plaintiff sued upon a benefit certificate upon the ground that he had become totally and permanently disabled, a trial amendment alleging that on account of plaintiff's mental disability he should recover, did not set up a new cause of action.

3.—Practice on Appeal—Statement Under Propositions.

Where there is no statement subjoined to appellant's proposition under a given assignment of error, such assignment will not be considered.

4.—Jurisdiction of District Court—Amount.

An objection that plaintiff's petition (in an action in the district court) shows his cause of action to be for a less amount than the jurisdiction of the court, is not well taken where it appears from the pleadings that at least $600 was then due under the terms of the contract sued on.

5.—Benefit Insurance—Permanent Disability—Charge.

Where plaintiff sued for an amount due under a benefit certificate in the event he should become disabled to "perform or direct any and all kinds of labor," it was not error of which defendant could complain for the court to submit the issue as being whether plaintiff had become disabled to perform and direct any and all kinds of labor, since this required both where either would have sufficed.

6.—Same—Judgment for Annual Installments Ahead.

Where, under the benefit certificate sued on, plaintiff was entitled to receive annually one-tenth of the amount named in the crtificate, he could recover only the amount of the installments due at the time of the trial, and a judgment for the entire amount and providing that execution might issue annually thereafter for the remaining installments, was error.

Appeal from Hill. Tried below before Hon. J. M. Hall.

L. C. Penry and *Vaughan & Works,* for appellant.

A. W. Cunningham and *Wear, Morrow & Smithdeal,* for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by the appellee, James M. Cox, on May 3, 1899, against appellant, a mutual benefit society, upon a benefit certificate issued by the latter to the former on the 14th day of June, 1897, to recover the sum of $3000.

The original petition alleged that on the 26th day of July, 1897, appellee was totally and permanently disabled, and that by reason of the certificate issued and the laws of the order, which are set out in our conclusions of fact, appellant became liable and promised to pay appellee $3000 as a liquidated sum in annual installments of $300 each, until the whole sum of $3000 should be paid, etc. That appellee is entitled to have a judgment declaring the entire sum due and payable; but in the event he is mistaken as to such right, that he is entitled to the sum due on said certificate at date of trial, and to a judgment requiring appellant to pay said annual installments to him during life, and at his death, any unpaid balance to his wife and child.

On March 22, 1900, the appellee filed a trial amendment in which, after reiterating the facts plead in his original petition, he alleged appellant had breached its contract, to his damage in the sum of $3000, for which amount he prayed judgment.

The appellant answered by general and special exceptions and a general denial.

The case was tried before a jury, to whom special issues were submitted, and the trial resulted in favor of appellee for the amount sued for; as to $647.60 of which, it being the amount past due on the contract with interest, the judgment provided execution should issue forthwith; and that the balance, to wit, $2400, should be payable in annual installments of $300 each, and that for such installments the appellee might have his execution against appellant for $300 not earlier than July 28, 1900, and execution for the remaining installments of $300 each not earlier than the 28th of July, in each succeeding year until the judgment is satisfied.

Conclusions of Fact.—On the 14th day of July, 1897, the appellant issued to appellee as a member of its order the benefit certificate sued on, entitling him to all the rights, benefits, and privileges of membership

in said order. It provides that at appellee's death one assessment on the membership, not exceeding in amount the sum of $3000, will be paid as a benefit to Alice and William, his wife and son, upon proper proof of appellee's death, together with the surrender of the certificate, provided he shall in every particular comply with the laws of the order in force, etc.

Section 188 of the laws of the association provides that any member holding a benefit certificate who shall become totally and permanently disabled from any cause, not the result of his own illegal act, to perform or direct any and all kinds of labor or business, or who shall arrive at the age of 70 years, and who has paid all legal dues and assessments since the date of his initiation to the date of such disability or period in life, shall be relieved from the payment of any further dues or assessments levied under these laws, or the by-laws of the tent of which he is a member, and shall be entitled to receive from the disability fund, annually, one-tenth part of the sum for which his benefit certificate was issued. Provided, however, that the aggregate of such installments received by him shall in no case exceed the sum specified in such certificate; and provided further, that any holder of a benefit certificate claiming the benefits of this section on the ground of disability shall submit to the supreme medical examiner such claim, accompanied by the affidavit of at least two reputable physicians, showing such disability to be total, and permanent as aforesaid.

Section 196 provides that on the 1st day of January, April, July, and October in each year the supreme finance keeper shall set aside from the general fund in his hands all money in excess of $2000 over and above its liabilities at such date, said money to constitute a fund for the payment of total and permanent disability benefits, whether the same arises from disease, accident, or old age, and to be used for such purposes only. The supreme finance keeper shall open an account in the records of his office, to be known as the disability benefit fund, and all money so set aside from the general fund, as above provided, shall be by him credited to said fund, and all warrants issued in payment of total and permanent disability benefits after July 1, 1893, shall be drawn upon and paid out of such fund so long as there shall be money enough therein to pay such warrants, and if at any time there should not be enough money in said fund to pay said warrants, they shall in such case be paid from the life benefit funds in the hands of the supreme finance keeper.

On July 28, 1897, the appellee, while engaged at his work as a railroad brakeman, sustained injuries not the result of his own illegal act, whereby he then became totally and permanently disabled to perform or direct any and all kinds of labor or business. He had paid to the order all legal dues and assessments since the date of his initiation to the date of such disability. Upon the trial appellant waived any proof of compliance with section 188 of its laws, and of the prosecution by appellee of claim for benefits in the order.

Before considering appellant's assignments of error, we will state in limine that upon the trial the parties waived all exceptions to pleadings, and that appellant, defendant below, waived all special pleas and all answers except general denial. And it was agreed that appellee, plaintiff below, might file a trial amendment setting up a breach of contract, and that appellant, defendant below, might urge exceptions to the same.

Conclusions of Law.—1. In the first assignment of error it is contended by appellant that the court erred in not sustaining its general exception to appellee's trial amendment, because "said trial amendment, taken in connection with plaintiff's original petition, of itself, did not present any cause of action against defendant for breach of the contract sued upon by plaintiff, in the manner and form alleged in said trial amendment, as the measure of damages that the plaintiff would be entitled to recover, if any, was fixed by the contract declared upon by him." It will be remembered from our statement of the pleadings that the trial amendment simply alleges the breach of the contract declared on in the original petition, and avers as damages for such breach in the sum of $3000. The averment of damages is merely one of legal liability which the law will infer from the allegations of facts which create it; and if the damages claimed flow from a breach of a contract by which they are to be measured, it is only necessary to lay them so high as to cover the amount of the injury sustained. This is done by the trial amendment in such a manner as to authorize the recovery of such damages as flow from the breach of the contract alleged.

2. Appellant's second assignment of error complains of the court's overruling its second special exception to appellee's trial amendment to his original petition. The special exception referred to in this assignment is as follows: "The defendant specially excepts to that portion of said trial amendment wherein it alleged that on account of plaintiff's mental disability he should recover against defendant; because the same was not alleged as one of the greivances of the plaintiff's cause of action in his original petition, and the said allegations contained in said trial amendment constitute a new cause of action." As the object of an amendment is to add something to or withdraw something from that which has been previously pleaded, so as to perfect that which is or may be deficient, or correct that which has been incorrectly stated by the party making the amendment (rule 12 of district and county courts), it seems to us that this exception is taken to what was directly authorized under the rule referred to. We can not perceive how the trial amendment, taken and read in connection with the original petition, can be construed as setting up a new cause of action. But if it could be so construed, the exception would not be well taken, because it is well settled in this State that a new cause of action can be set up by an amended pleading. When a new cause of action is so averred, it may be established on the trial, unless it appears by exceptions or plea that it

is barred by the statute of limitations. No such exception or plea was urged to appellee's action set up by his amendment.

3. There is no statement subjoined to appellant's proposition under the third assignment of error, and for that reason the assignment will not be considered.

4. It is complained in the fourth assignment of error that the court erred in overruling appellant's general demurrer. The proposition under this assignment is: "If the statement of plaintiff's cause of action, when given its legal effect, shows his cause of action to be for a less amount than the jurisdiction of the court, it has no jurisdiction." This is hypothetically correct, but the supposition upon which it is based has no foundation. For it appears from the pleadings, as well as the facts proved, that when the trial amendment of plaintiff's original petition was filed at least $600 was then due under the terms of the contract sued upon.

5. It is urged in appellant's fifth assignment of error that the court erred in submitting the fourth special issue, which is: "Has plaintiff become totally and permanently disabled to perform *and* direct any and all kinds of labor or business?" to the jury. If the plaintiff had become totally and permanently disabled to both peform and direct any and all kinds of business, it logically follows that he was totally and permanently disabled to *either* perform *or* direct any and all kinds of business. This being logically the effect of an affirmative answer to the issue submitted by the question, the court then, in the following language, submits the fifth special issue: "If he has become totally and permanently disabled to perform *or* direct any and all kinds of labor or business, then state the day of the month and the year he became so." We think the issue submitted was as clearly and tersely stated as language could express. In this connection we will say the court did not err in refusing to submit the special issues requested by appellant mentioned in the seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth assignments of error.

6. If it should be conceded that under the facts plead appellee was entitled to recover at the time of trial the entire amount provided for under the contract, there would be no error in the court's instruction "that if they should find from the evidence plaintiff from any cause, not the result of his own illegal act, has become totally and permanently disabled to perform or direct any and all kinds of labor or business, then to state the amount due plaintiff and the amount to become due, and when the same matures. And that the amount due would be the installments each year since the date of the total and permanent disability, together with interest thereon at the rate of 6 per cent per annum from date of maturity of each installment to time of the trial. That the amount to become due would be one-tenth of the sum stated in the benefit certificate, and the first installment will be due one year from the date of last installment found to be due at time of trial, and that each succeeding installment will become due one year from the maturity of the last pre-

ceding installment, but the total amount of all installments must not exceed the sum stated in the face of the benefit certificate, exclusive of interest upon the overdue installment." The certificate sued upon taken in connection with section 188 of the laws of the association, specially provides, in event of appellee's total and permanent disability, to perform or direct any and all kinds of labor or business, that he shall be entitled to recover from the disability fund, annually, one-tenth part of the *sum* for which it was issued. The only sum mentioned in the certificate is $3000. If it could be construed, as it is contended by appellant, to mean "one assessment on the membership not exceeding in amount the sum of $3000," it will be presumed, in the absence of an averment by appellant to the contrary, that one assessment on the membership would equal a sum at least of that amount. But we think "the court erred," as is complained of in appellant's sixteenth assignment of error, "in rendering judgment for any other sum of money than for the amount that was due and payable to plaintiff, by the terms and conditions of the policy sued upon at the date of the verdict, because no liability had accrued against defendant in favor of plaintiff, on account of the policy, for any other sum of money than the amount that was due to plaintiff according to the terms and conditions of the policy upon which his cause of action is based." This case is not in the nature of an action for specific performance of a contract, nor one to enforce a lien either upon property or a specific fund, but to recover a debt, some of which is not due. It is elementary that in an ordinary action at law to recover a debt it must be averred and proved that the demand is due.

Therefore the judgment for so much of plaintiff's debt as was due when the case was tried will be affirmed, and as to the installments then not due it will be reversed, and plaintiff's action therefor dismissed without prejudice.

Affirmed in part; reversed in part.

J. A. GILLEAN ET AL. v. CITY OF FROST.

Decided February 6, 1901.

1.—Dedication to Public Use—Park and Lake.

Where the owner of a tract of land divides it into blocks, lots, streets, and alleys, with reservation of a lake and park shown on the plat, which was duly recorded, and in his sales of the lots repeatedly declares that the lake and park are reserved for the public use, this is a sufficient dedication of them to such purpose.

2.—Same—Deed Not in Conflict with Dedication.

Where such owner subsequently conveyed the land covered by the lake to a railroad company, with condition that the lake should be maintained thereon, and a reservation of the right of the public to use the water, in connection with the company, this did not declare a trust in the company in favor of the public, but was merely declarative of a benefit already set apart to the people of the town.

3.—Same—Acceptance of Dedication.

Where, immediately after the dedication of the park and lake to public use, the inhabitants of the town entered upon their use and continued such use until they were interfered with by appellants, claiming adversely, this constituted an acceptance, and the dedication becomes irrevocable.

4.—Same—Subsequent Incorporation of Town.

It was not necessary that the town corporation should have been created at the time of the dedication, and the right by the dedication passed to the corporation when it was created.

5.—Same—Limitations Not Set in Motion—Quitclaim.

Where the original owner of the townsite tract conveyed to a land company all the unsold portions thereof, subject to his deed of the lake to the railway company, containing a reservation of the right of the public to use the lake, and the land company then conveyed the lake tract to appellants by quitclaim, such latter deed did not of itself suffice to put in motion the five years statute of limitations in appellants' favor.

6.—Same—Lake May Be Dedicated.

A lake may be dedicated to the public use, and is comprehended under the term "grounds" as used in the article of the statute which provides that no right shall be acquired by adverse possession and limitations to any street, sidewalk or grounds belonging to or dedicated to any city, town or county. Rev. Stats., art. 3351.

7.—Same—Taxation by Town Not Impairing Dedication.

The fact that after the quitclaim deed of the lake tract to appellants, the town corporation assessed taxes thereon against him and collected the same, did not impair the rights acquired by the dedication.

8.—Same—Limitations—Recognition of the Public's Right by Attempt to Lease.

Where appellants, after the quitclaim deed of the lake tract to themselves, attempted to lease the property from the people of the town, this was such a recognition of the right by dedication as prevented the running of limitations in appellants' favor prior to that time.

9.—Same—Judgment Sustaining Dedication Too Broadly.

In an action by a town on behalf of its citizens to recover the use of a park and lake dedicated to the public, a judgment in favor of the town which also adjudges that it should not deprive the defendants "or other persons" of the proper or reasonable consumption of water from the lake, is erroneous in so far as it relates to the "other persons," since these latter were not parties to the suit, nor their rights in any way involved.

Appeal from Navarro. Tried below before Hon. L. B. Cobb.

Simkins & Mays, for appellants.

Frost, Neblett & Blanding, for appellee.

FLY, ASSOCIATE JUSTICE.—This suit was instituted by the appellee against J. A. Gillean and W. C. Gillean to try title to land in the western part of the town of Frost, known as the "Lake," containing thirty-two acres of land, and the "City Park," containing seven acres of land. They pleaded general denial, nonjoinder of parties plaintiff, not guilty and limitation of three, five and ten years, and prayed that their warrantors, W. B. Jones, R. A. Mitchell, J. A. Tullos, L. A. Morgan, and J. H. Galbreath, be made parties defendant, and that in case of their eviction they have judgment over against them. The case was tried by the court without a jury, and judgment was rendered "that the plaintiff,

the city of Frost, do have and recover possession of said permises from the defendants for the benefit of the public use for all purposes and uses as a pleasure and recreation grounds, said lake being a part and parcel of said premises, and to be used in connection with said park, and said premises shall be held and controlled, and its use regulated by said municipality, plaintiff herein, for all purposes of recreation, pleasure, diversion, and entertainment, the full possession of the surface thereof being adjudged and decreed to the plaintiff, and that such use in the plaintiff shall not deprive the defendants or other persons from the proper or reasonable consumption of water from said lake." It was further decreed that the Gilleans take nothing by their cross-action as against any of the other defendants except W. B. Jones, against whom they recovered judgment for $240.

In 1887 the St. Louis, Arkansas & Texas Railway Company was built, and passed over a tract of 150 acres of land off the Noah Kessiah survey in Navarro County, owned by Bryan T. Barry. A station was located on the land, and the land was surveyed into blocks, lots, streets, and alleys, and a certain piece of land containing about seven acres was designated as the "City Park," and lying adjacent to it there was another designation of the "Lake," containing from thirty to fifty acres of land. In passing across Barry's land a creek was crossed by the railroad which, by an agreement between the railroad company and Barry, instead of being crossed by a bridge, was crossed on a solid embankment which dammed up the creek and flooded the land and formed the lake. After the lake had been formed by the dam across the creek, late in 1887 a public sale of the lots into which the land had been subdivided took place. The sale was superintended by Barry, and maps of the proposed town, which was named Frost thereon, were distributed among the numerous persons who were present to buy. On those maps the streets, blocks, lots, and the "City Park" and "Lake" were designated, and during the sale it was repeatedly declared by the auctioneer and Barry that the lake and park were for public use. Afterwards private sales were made by Barry, and in each of them the right of the citizens to the use of the lake and park was held out as an inducement to purchase. On April 17, 1888, Barry executed a deed to the railway company in which was the following recital:

"In consideration of $2.50 and for the benefits to accrue to me and my property by the erection and maintenance of a lake of water, herewith sketched, situated at Frost, a station on the Corsicana & Hillsboro branch of the "Cotton Belt" railway, in Navarro County, I convey (the land covered by the lake), with leave to overflow it with water for the supply and use of said company in the operation of its railway and such other uses and purposes for the benefit of said company and its property, and also for the benefit of the town of Frost and its business, as they may desire to put same to, from time to time.

"It is understood, however, that the citizens of the town who purchase lots from me, and to whom I may, from time to time, give my written

consent thereto, shall have the right to use water for manufacturing purposes out of said lake, so as not to reduce the quantity of water for the immediate and prospective use of the railway company for all purposes of their use. On failure for a year to maintain the lake, the use of the land shall revert to me and my heirs, and this conveyance stand for naught.

"To have and to hold the premises, with all rights, appurtenances, and privileges, to the said railroad, its heirs and assigns forever.

"I also reserve the right to stock said lake with fish, and to use same to angle therein, so as in no way to interfere with said uses of said railway company."

The town increased in population, the lake was stocked with fish, and it and the park were used by the people as a place of public resort, and use of them was untrammeled until some time in the latter part of 1892 or early part of 1893, when W. B. Jones, who was in possession, charged an admittance to the lake and park. He had prior to that time fenced the premises in controversy over the protest of many citizens. In December, 1889, Barry executed a deed to Mitchell, Morgan and others, composing a land company, conveying property described as follows: "All that certain land situate at Frost in Navarro County, in one body, and out of one survey, to wit: 'The Noah Kessiah survey, and described in two parcels, as follows: One hundred and thirty acres, * * * being the same land subdivided into lots and blocks and upon which the town of Frost is situated, except the lots in certain blocks which I have conveyed to various parties, and two lots in block 16 for school purposes, * * * and subject to the conveyance of the right-of-way reservation, depot grounds, section house, and pond of water and water privileges, heretofore made by me to the St. Louis, Arkansas & Texas Railway Company. * * * It being my intention to hereby convey the lots and land, and privileges connected therewith, owned by me on the said Noah Kessiah survey.'" In 1890 W. B. Jones erected waterworks, using the lake for a water supply, having rented the lake and park from the land company. In October, 1892, the land company, by quitclaim deed, conveyed the lake and park to Jones. The park and lake were fenced by Jones after his purchase. On June 7, 1893, the town of Frost was incorporated, the lake and park being within the corporate limits, as well as all the 150 acres that had been subdivided and platted by Barry. The plat of the town of Frost was placed on record in Navarro County in 1887. On March 24, 1899, W. B. Jones conveyed to John A. Gillean the "City Park" and the "Lake," including the machinery and appliances described as "waterworks." In 1896 Jones endeavored to lease the property from the citizens of Frost, but failed. This was done after he had been advised by his attorney that he had no title to the land. Jones paid taxes on the premises after he bought them.

The evidence established conclusively that the park and lake were dedicated to the public use. It was clearly the intention of Barry, the

owner of the land, to set apart for the public use the lake and park. This intention was evidenced by the division of the land into blocks, lots, streets, and alleys and reservation of the lake and park, on the plat which was duly recorded, and by his repeated declaration that they were reserved for the public use, and the public made use of the property. Oswald v. Grenet, 22 Texas, 94; Lamar County v. Clements, 49 Texas, 347; Railway v. Sutor, 56 Texas, 496; Ranthum v. Halfman, 58 Texas, 551; Wolf v. Brass, 72 Texas, 133; San Antonio v. Grandjean, 91 Texas, 430; Dill. Mun. Corp., sec. 645.

Not only did Barry, by preparing and recording the plat and by repeated declarations, set apart the premises to the public use, but in the deed afterwards made to the railroad company he recognized the dedication, and in effect withheld it from being interfered with by the grantee. Whether at the time the dedication was made, it was known to the public that the railroad company had erected the dam and created the lake, and that the dedication was incumbered with the use by the railroad company of the water, and whether the city of Frost is bound by the deed to the railway company, can not figure in this case, because there is no conflict between the citizens of Frost and the railway company. It was not interfering with the public in their use of the lake, and was in no way concerned in the litigation between the appellants and appellee, and was not therefore a necessary nor proper party to the suit. The deed can not by reasonable construction be held to declare a trust in the railway company in favor of appellee, but is merely declarative of a benefit already set apart to the people of the town.

Immediately after the dedication of the premises to public use, the inhabitants of the town entered upon the use of it, and continued its use until they were interfered with by appellants, and such use constituted an acceptance. As said by the court in Wolf. v. Brass, above cited: "It is sufficient if there has been some act or declaration upon the part of the owner of the fee indicating unequivocally his purpose to dedicate, and the public has used the property for the purposes to which the act or declaration of the proprietor indicates it was his intention to dedicate it." And in the case of the City of San Antonio v. Grandjean, 91 Texas, 430, it is said: "Yet we understand the authorities to agree, that if the tender be unequivocal and the easement be used by the public, even without formal acceptance by the property authority, the dedication becomes irrevocable."

There is authority for the proposition that, as against the owner of the fee, a dedication of land for streets and highways may be complete without any act or acceptance on the part of the public, but in order to charge a city with the duty to repair, or make it liable for damages sustained by a defect, there must be an acceptance by the proper authorities. Price v. Breckenridge (Mo.) 5 S. W. Rep., 20; Cook v. Harris, 61 N. Y., 448; Holdene v. Trustees, 21 N. Y., 474. The doctrine of dedication as applied to streets has been extended to public squares,

and the fact of dedication is established in the same way in both cases. Dill. Mun. Corp., sec. 644.

It was not necessary that the corporation should have been created at the time of the dedication, but it would pass to the corporation when it was created. City of Llano v. County of Llano, 5 Texas Civ. App., 132; Price v. Breckenridge, above cited; New Orleans v. United States, 10 Pet., 661; Pawlet v. Clark, 9 Cranch, 292. The owner could not reclaim the premises while awaiting the existence of a grantee capable of taking it, if it remained in public use. There was, however, no attempt upon the part of Barry to reclaim the premises, but on the other hand, he at all times recognized the right of the public, both in deeds executed by him and in his other acts and conversation. Title to the lake and park was never claimed by anyone until 1896, when Jones failed to obtain a lease from the citizens.

In the deed from the land company to W. B. Jones, the title conveyed was subject to all privileges granted by Barry to the land company, and it was provided that he was not to charge exorbitantly for water, or to refuse water for manufacturing or other purposes. A reference to the deed from Barry to the land company discloses this recital: "This deed is made subject to the conveyance to the right of way reservation and depot grounds for the section house, and also for the pond of water, and water privileges, heretofore made by me to the St. Louis, Arkansas & Texas Railway Company." In the last conveyance referred to the right of the public in the lake is recognized. The deed from the land company therefore did not attempt to convey any rights to Jones antagonistic to those named in the conveyance from Barry to the railway company. That deed did not, therefore, of itself start the statute of five years' limitation, and it was not until after the incorporation of Frost that any claim was set up by Jones adverse to the use by the public of the premises, and even as late as 1896 Jones recognized the claims of the citizens to the premises by endeavoring to obtain a lease of them.

We do not agree with the contention of appellant that a lake could not be dedicated to the public use, and we are of the opinion that within the provisions of article 3351, Revised Statutes, would be included a body of water dedicated to public use. It can not be doubted that an artificial pond or lake would be comprehended under the term "grounds" used in the statute. The dedication of the park and lake was made at one and the same time, one being adjacent to and forming with the other one property set apart to public uses, and it is conceded that if the lake was smaller than the park and included in it, the dedication could take place, but we do not think the relative sizes of the two can exercise any influence on the designation, because, as before stated, if the whole premises were covered with water, the dedication would attach.

The suit was instituted by the appellee to recover the premises for itself, and it was decreed to the appellee to be held for certain purposes, but the judgment went further and adjudged that appellee should not deprive appellants "or other persons" of the proper or reasonable con-

sumption of water from the lake. Who the other persons are that are to be protected does not appear in pleadings or evidence. The city of Frost obtained judgment as representing its citizens, and there should have been no judgment protecting the people it represented from its aggressions. There was in the case no one's interests to be protected against it, except the parties it had sued, and no adjudication as to the rights of others not parties should have been made.

The assessment and collection of taxes by the municipality did not impair the rights acquired by the dedication, and it did not confer any rights on appellants. The city could not by deed have conferred any right on appellants antagonistic to the dedication, and it would seem clear that the assessment and collection of taxes, nor any like act, could have more extensive powers than a deed by the city. The dedication was to the public, and the corporation acted as the trustee of the public in the preservation of the rights made to the public, and no acts of the corporation could estop it from performing its duty to the public in maintaining the rights the public had acquired by the dedication. Rhodes v. Brightwood (Ind.), 43 N. E. Rep., 942.

The judgment will be reformed so as to eliminate the words "or other persons," and affirmed.

Reformed and affirmed.

ON MOTION FOR REHEARING.

While there is testimony to sustain the finding of this court that the deed to the railroad company was executed after the sale of the lots, it is a matter of small importance as to whether it was or not. The suit is not as to what rights the railroad may have, but as to what the rights may be of a person claiming under Barry, who dedicated the park and pond to public uses. Appellant can have no other or higher rights than were conveyed to his vendors by Barry. If Barry had dedicated the pond and park to public uses, he could not have given to his vendees any rights antagonistic to those public uses. Barry swore that he did not sell the lake or park to anyone.

We adhere to the ruling that the attempt to obtain a lease of the premises from the people of Frost was a recognition of their rights to lease. "A single lisp of acknowledgment by the defendant" of the title of the inhabitants of Frost is fatal to the plea of limitation. Wood on Lim., 692; Railway v. Speights (Tex. Sup.), 60 S. W. Rep., 659.

The motion is overruled.

Overruled.

GOODLOW WOOD v. V. M. COLE ET AL.

Decided February 13, 1901.

1.—Marriage of Slaves—Validity.

Marriages such as existed between negro slaves with the consent of their masters were void in law, but where they voluntarily continued the relation of husband and wife after their emancipation, such continuance of the relation is deemed a valid common-law marriage.

2.—Same—Burden of Proof in Trespass to Try Title.

Where plaintiff, as widow of a deceased former slave by virtue of a slave marriage, sued in trespass to try title for lands acquired by him, it devolved on her to prove that she and the deceased lived together as husband and wife after their emancipation.

Appeal from Lamar. Tried below before Hon. E. S. Chambers.

Allen & Dohoney, for appellant.

Moore, Park & Birmingham, for appellees.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by appellant against M. E. Cole and her husband, V. M., and Addie Wood, in the form of an action of trespass to try title to recover a half interest in certain lands which she alleged were acquired as community property during her marriage, with one Aaron Wood. One Bessie Lewis intervened, claiming an interest in the property. The case was tried without a jury, and judgment was rendered in favor of appellees.

The conclusions of fact found by the court are as follows: Aaron Wood, now deceased, and Goodlow Wood, the plaintiff, were negro slaves until their emancipation on June 19, 1865. With the consent of their master, they were married in 1858, after the manner of slaves, and so lived together as husband and wife until some time in 1864 or 1865, when Aaron and Aggie Ball, a negress and formerly a slave, began to cohabit occasionally. And in the latter part of December, 1865, they commenced living together regularly as man and wife, recognizing each other and recognized by the community in which they lived as sustaining such relation, until the death of Aggie, on May 1, 1891. In March, 1867, M. E. Cole, one of the defendants, was born to them. On the 4th day of February, 1868, a marriage license was procured, and the marriage rites between Aaron and Aggie regularly solemnized by virtue thereof. M. E. Cole was the only child of their marriage, and she was recognized and treated by both as their child.

All the property in controversy was acquired by the joint labor and effects of Aaron and Aggie, and all, except one tract, was acquired after the marriage ceremony under the license was performed.

After the death of Aggie, Aaron Wood married the defendant, Addie Wood, and, on the 27th day of May, 1899, he died intestate in Lamar County, Texas. His widow, Addie, and M. E. Cole, his child, survived

him. In December, 1899, a posthumus son of Aaron Wood was born unto his widow. This child died the following March, leaving his mother, Bessie Lewis, his half sister, and M. E. Cole as his heirs.

These conclusions are sustained by the evidence. It will be noticed that the trial judge did not find directly whether Aaron and Goodlow lived together as husband and wife after the 19th of June, 1865. But the evidence, though conflicting, is sufficient to warrant the conclusion that they did not after that time so live together.

In order to successfully maintain this action its was incumbent upon the appellant to prove a marriage valid in law to Aaron Wood, and that the relationship of husband and wife existed between them when the property in controversy was acquired and continued up to the time of Aaron's death. It is well settled that such marriages as existed between negro slaves were void. Timmins v. Lacy, 30 Texas, 136; Livingston v. Williams, 75 Texas, 655; Hall v. United States, 2 Otto, 27; Adams v. Sun, 25 So. Rep., 893; Scott v. Raub, 14 S. E. Rep., 178; Renfrow v. Renfrow, 56 Pac. Rep., 534; McDowell v. Sapp, 39 Ohio St., 558. This propoistion is not denied. But if, having married after the manner of slaves during bondage, they voluntarily continued the relation of husband and wife after their emancipation, such continuance of the relation would be deemed a valid common-law marriage. Cumby v. Garland, 25 S. W. Rep., 673. The contention of appellant is that such relation did so continue. This is purely a question of fact, which it devolved upon her to establish. If it should be conceded that order No. 3 issued by General Granger on the 19th day of June, 1865 (2 Paschal's Digest of Laws of Texas, article 1492), legally abolished slavery in Texas, and conferred upon them all the rights of citizenship and imposed upon them all its reciprocal duties and obligations (which the writer does not and never did believe), still the evidence is insufficient to show that Aaron and Goodlow, after the 19th day of June, 1865, continued to live together as husband and wife. This not being established, appellant can not recover.

The judgment is affirmed.

Affirmed.

Writ of error refused.

S. H. WATSON v. R. C. BOSWELL ET AL.

Decided February 13, 1901.

1.—Landlord and Tenant—Stipulation Against Damages for Illegal Distraint.

A stipulation in a lease exempting the landlord from liability for damages resulting from any future distraint is void as being against public policy in depriving the courts of the power to redress wrongs done to the tenant.

2.—Same—Distress Warrant—Damages.

Where the landlord establishes any one of the statutory grounds upon which the distress warrant is sued out, his failure to establish the others does not subject him to liability in damages to the tenant.

3.—Same—Damages Where Part of Debt Not Due.

Where the proof showed that a part of the debt alleged to be due by the landlord in his application for the distress warrant was in fact due and a part was not due, the tenant was not entitled to damages because the entire crop was distrained, since the landlord was entitled to levy upon all the property covered by his lien, but only to such damages as he actually sustained by reason of the wrongful averment in the application of a greater amount due than was actually due at that time. Following McKee v. Sims, 92 Texas, 51.

4.—Evidence—Self-Serving Letter Suggesting Settlement.

A letter by defendant's attorney to plaintiff, to the effect that defendant was ready to consider any reasonable proposition of settlement plaintiff might submit, is not admissible in evidence.

5.—Same—Parol Varying Writing—Consideration of Note.

Parol evidence is admissible to show that a note was without consideration, since this does not change or vary the written contract.

6.—Same—Answer in Another Suit as Corroboration.

Where defendant testified that he paid certain money to W. for plaintiff, as a payment on the note sued on, he could corroborate this by putting in evidence an answer filed by plaintiff in an action against him by W., stating that defendant had paid such money to W. for plaintiff.

7.—Same—Evidence to Show a Mortgage.

A bill of sale absolute on its face may be proven a mortgage by parol evidence showing that it was intended merely as a security for a debt.

8.—Same—Illegal Distress Warrant—Exemplary Damages.

Where exemplary damages are sought for an illegal distraint by the landlord, the tenant may, as bearing on that matter, give evidence of loss of time by himself and family, as a result of the seizure of his crop.

9.—Landlord and Tenant—Distress Warrant—Damages.

Where a distress warrant is wrongfully sued out the value of time spent, and expenses incurred, by the tenant in regaining possession of his property by replevying it, is a proper element of damage.

10.—Evidence Held Secondary—Books of Account.

Testimony that certain books of account show a certain indebtedness is secondary evidence and not admissible.

11.—Chattel Mortgage—Live Stock.

A duly recorded chattel mortgage upon all live stock owned by the maker is superior to a chattel mortgage subsequently given by him upon two certain mules that he owned at the date of the first mortgage.

12.—Costs—Amendment.

Where an amendment merely omitted a part of the amount claimed in the original petition, the trial court went beyond sound judicial discretion in taxing against the party all costs up to that time.

Appeal from the County Court of Ellis. Tried below before Hon. J. E. Lancaster.

C. M. Supple, for appellant.

Templeton & Harding, for appellees.

NEILL, ASSOCIATE JUSTICE.—The appellant, Watson, claiming certain indebtedness accruing to him from the appellee, Boswell, growing out of the relation of landlord and tenant existing between the parties, caused the issuance and levy of distress warrants upon the property of

the latter upon which the former claimed a landlord's lien to secure such indebtedness. After the writs, which emanated from the justice court, were levied and the property distrained and it was replevied by Boswell, and the papers in the distress proceedings were filed in the office of the county clerk, Watson filed suit in the county court against Boswell to recover the alleged indebtedness and to foreclose certain alleged mortgage liens on some of the property, as well as his alleged landlord's lien on all, setting up, also, the issuance of the distress warrants, the seizure of the property by virtue thereof, its replevy by the defendant, and asked judgment on the replevy bond against the principal and the sureties thereon.

The defendant plead failure of consideration of one of the notes, evidencing a part of the indebtedness; that one of the mortgages alleged by plaintiff to have been made by him to secure a part of the latter's demand was a forgery; matters in offset; and, in reconvention, actual and exemplary damages for wrongfully and maliciously suing out the distress warrants.

D. W. Oppenheimer and A. E. Kiersky, sureties on Boswell's replevy bonds, answered denying any liability. Kiersky then by answer, in the nature of a plea in intervention, averred that he had a superior mortgage lien to the liens claimed by plaintiff on two certain gray horse mules and on the crop of cotton and corn grown by Boswell to secure him in an indebtedness in the sum of $173, for which sum he asked judgment, together with a foreclosure of his alleged mortgage.

The case was tried before a jury who found a verdict in favor of Boswell on his counterclaims and plea in reconvention against the plaintiff for $585.78, and in favor of the latter against Boswell for $526.71. They then found the difference between plaintiff and defendant to be $59.24, in favor of the latter, less $20.75 with 6 per cent interest from May 29, 1899. The jury also rendered a verdict in favor of Kiersky on his plea in intervention and for a foreclosure of his alleged mortgage lien as against both plaintiff and defendant.

From the judgment rendered on the verdict against him Watson has appealed, and has assigned errors which relate both to the judgment in favor of Boswell and to the one in favor of Kiersky.

Opinion.—1. The contract between Watson and Boswell which established their relation as landlord and tenant provided that in the event the former should institute suit for distraint against the latter, he should be free from all damages to appellees' crops, from whatever cause claimed, or from any personal liability arising therefrom in any wise whatsoever. In view of this provision of the contract, the appellant asked the court to instruct the jury that appellee could not recover either the actual or exemplary damages sued for. The court's refusal to give such instruction is assigned as error. In order for a party to obtain rightfully the issuance of a warrant in this State to distrain the property of another, certain facts must exist, which the statute requires

the party applying for such process to verify by his affidavit. If the facts exist and are verified in this manner, however much the party against whom it issued may have been damaged by the distraint of his property, he can not recover either actual or vindictive damages. But if the facts which authorize the issuance of this extraordinary and ofttimes harsh process do not exist, the party, to obtain a distress warrant, must necessarily swear falsely, and in procuring the writ by this means, violates the law and renders himself liable for actual and vindictive damages, as well as to a criminal prosecution. So it is seen the clause in the contract upon which the refused charge is predicated, as far as the agreement between the parties can, authorizes the wrongful issuance and abuse of judicial process, and exempts the party guilty of such wrong from such damages to the injured party as flow from such abuse, thus closing the courts of justice to the oppressed and granting immunity to the oppressor. The superior condition of the landholder to the tenant class gives the former such an advantage in making rental contracts that it is against public policy to allow the former to use such advantage by inserting such a provision in a contract of lease as authorizes oppression through process of the law, and, if enforced, renders the courts powerless to redress the wrongs flowing from such oppression. We think, therefore, that clause of the contract is void as against public policy. Loftus v. Maxey, 73 Texas, 242; Gillett v. Moody, 54 S. W. Rep., 35.

2. There are several statutory grounds for the issuance of a distress warrant. When more than one is properly alleged in the application for the writ, its procurement does not subject the applicant to an action for damages, if one of the grounds is established upon the trial, though the proof may fail to show the existence of the others. The grounds averred in this case were, (1) that a certain amount of the debt sued for was due and unpaid; (2) that the appellee had removed from the rented premises a portion of the agricultural products raised thereon during the year 1899, and (3) that he was about to remove from said premises other products raised thereon during said year. The first and third, if the amount sued for is for rent, are statutory grounds. The second is not. Rev. Stats., art. 3240. The court, in its charge upon the issue of damages, in effect instructed the jury that if some of the amount of the debt averred in the application to be due was not a subsisting indebtedness, the writ was, as to so much of the alleged debt as did not subsist, wrongfully sued out, and its wrongful issuance, on that account, would render the appellant liable for damages. This part of the charge is complained of as error for the reason that it, in effect, excluded from the jury the consideration of the other grounds alleged in the application for the writ, and authorized a verdict against appellant on the issue of damages, although the evidence shows the existence of both or one of the other grounds. There was evidence tending to prove that the third ground stated in the application was true. If, as we have said, it existed when the warrant was issued, such issuance

was not wrongful nor unlawful, and no liability would be incurred by appellant. We think, therefore, the assignment is well taken. The appellant, by special charges which were refused, having suggested this error, the trial court should have corrected it by giving a proper charge upon the issue.

3. Besides, if the first had been the only ground alleged, and the evidence had shown a part of the debt alleged to be due for advances was in fact due, though a part of it was not, Boswell would not be entitled to damages by reason of the whole crop being distrained (for in event a part of the debt was due, appellant was entitled to levy upon all the property upon which he had a landlord's lien), but only to such damages as he may have actually sustained by reason of the wrongful averment in the application of a greater amount due for advances than was actually due when the warrants were applied for. McKee v. Sims, 92 Texas, 51.

4. If it should be conceded that the letter written by Boswell's attorney to appellant, to the effect that appellee was ready to consider any reasonable proposition of settlement appellant might submit, was admissible in evidence, then it might be that the facts appellant offered to prove by his attorney, Mr. Supple, were admissible for the purpose of showing that appellee, notwithstanding the statement in the letter, had no intention of entertaining a proposition of compromise, and had such letter written merely for the purpose of placing appellant in an unfavorable attitude before the jury upon the trial of the case. But upon no conceivable ground was such letter admissible in evidence. Its exclusion upon another trial will leave no pretext for appellants' offering the testimony, the rejection of which is complained of in his seventh assignment of error.

5. The testimony of Boswell complained of in the eighth assignment of error was admissible to show that the eighty-dollar note sued on was without consideration. To show the true consideration or the failure of consideration of a promissory note is not prohibited by the rule that it is not permissible to change or vary a written contract by parol testimony.

6. If, as is stated in appellant's ninth assignment of error, it appeared from the answer of appellee, admitted to have been filed with his knowledge and concurrence, in the suit of Bailey against him, that he admitted the $45 credit given him in the account sued on by Bailey was paid the latter by Watson, then the answer would be admissible in corroboration of appellant's testimony that he paid that sum to Bailey for the appellee, as a part of the consideration for one of the notes sued on, and in rebuttal of appellee's testimony denying the truth of such testimony. But no such admission or statement appears in such answer. Therefore the court did not err in refusing, upon the ground of irrelevancy, to admit it in evidence.

7. It was not error for the court to admit the evidence, complained of in appellant's tenth assignment, to show that a certain bill of sale

executed by appellee to appellant for three hogs was intended merely to secure the latter by reason of the former's having sold a cow upon which appellant had a mortgage. It is generally admissible to show that an instrument purporting upon its face to be an absolute deed is in fact merely a mortgage. Such testimony does not vary the written contract, but merely shows what it is in fact.

8. Evidence of the loss of time of appellee and family occasioned by the seizure of his crop may not have been admissible to show actual damages, because not the natural and proximate result of the seizure, but upon the issue of exemplary damages, we think, was admissible.

9. If the writs were wrongfully sued out, then the value of the time spent and expenses incurred by appellee in regaining possession of his property by replevying the same was a proper element of damages, and its admission was not error. Suth. on Dam., 2 ed., sec. 512.

10. The testimony of Oppenheimer that Kiersky's books of account showed that Boswell was indebted to him on open account $173.60, according to the books, inclusive of the $75 note, was secondary evidence and should not have been admitted.

11. Special charge number 9, by which appellant asked the court to instruct the jury that mortgage No. 52,979, on file in the office of the county clerk, was sufficient to put Kiersky on notice that it secured all indebtedness by note or otherwise owed appellant by Boswell on, prior to or subsequent to October 24, 1898, and to convey notice that the mortgage covered all stock owned prior to or subsequent to that date; and that if the jury believed from the evidence that the two gray mules, on which Kiersky claimed a mortgage, were owned by Boswell on or prior to October 24, 1898, and were so owned when the mortgage to Kiersky was made, to find that plaintiff's mortgage was superior to Kiersky's, was the law applicable to the facts and should have been given.

12. The action of the court in taxing all the costs of the case up to the time appellant filed his original petition was a matter largely within the sound discretion of the trial court, but if it could be made to appear that the original petition showed a good cause of action within the court's jurisdiction, then it would seem to us that, as the amendment simply omitted a part of the amount claimed in the original petition, the court went beyond sound judicial discretion in taxing such costs against appellent.

On account of the errors indicated the judgment of the county court, for both Boswell and Kiersky against appellant, is reversed and the cause remanded.

Reversed and remanded.

J. L. LOVEJOY v. TOWNSEND & TIPTON.

Decided February 20, 1901.

1.—Assignment of Error—Conclusions of Law.

An assignment of error to the action of the trial court in refusing appellant's request to find a certain conclusion of law is not well taken, since, if the conclusions of law are erroneous, they may be revised in the appellate court on proper assignments.

2.—Landlord's Negligence in Not Keeping in Repair—Act of God.

A person is not excused for an act of God, where his own negligence is a concurrent cause of the injury; as where a landlord who was bound to keep the building in repair suffered the margin of the tin roof to become and remain loose, whereby a strong windstorm rolled the roof back, admitting rain, which damaged the tenant's goods.

3.—Same—Lease—Covenant to Repair.

Where the landlord expressly contracted to repair and keep the roof in repair, it is immaterial whether or not the roof was in a defective condition at the date of the lease.

Error from the County Court of Rockwall. Tried below before Hon. E. D. Foree.

N. C. Edwards and *Garnett, Smith & Merritt,* for plaintiff in error.

L. D. Stroud, for defendants in error.

JAMES, CHIEF JUSTICE.—There is no statment of facts. The judge's conclusions of fact are: That Townsend & Tipton rented of Lovejoy one of the lower floor storerooms of a two-story rock building for a dry goods business; that Lovejoy, in his contracts with the several tenants of said building, including the one in question, "expressly reserved the exclusive possession, control of, and the obligation to repair and keep in repair" the roof of the building; that the roof became out of repair by reason of Lovejoy's negligence during the term of this lease by reason of the margin of the tin roof becoming and being allowed to remain loose and detached from the wall, so that a strong wind, accompanied by lightning and rain, loosened the roof and rolled it back uncovering about half the building over Townsend & Tipton's store, and damaging their goods; that this storm was not such a casualty but that precaution against the same might and should have been provided by the exercise of reasonable precaution and prudence on the part of plaintiff; that the damage was not due to or caused by the act of God, but proximately by the neglect of plaintiff, and that the condition of the roof was unknown to defendants, and was known or ought to have been known to plaintiff.

The action was brought by Lovejoy for rent, and defendants, by cross-action, asked for damages alleged to have been sustained by them from said occurrence, and the latter was allowed by the court. In a

supplemental finding of facts the court found that the roof was in substantially the same condition at the time of the injury as it was when Tipton & Townsend rented the store, and that the proof showed that the roof was fastened and attached to the building by the usual and customary methods, and that such attachments and anchors had become insecure at the time of this event.

The first assignment of error is that the court erred in refusing, at appellant's request, to find a certain conclusion of law. If the judge's conclusion of law are erroneous, they may be revised in the appellate court on proper assignments.

The second assignment is that the court erred in holding the landlord liable, because this is contrary to the conclusions of fact in that the findings show the injury was caused by an act of God; and because they further show that the premises were in substantially the same condition when the lease was made as when the injury happened; and because they further show that the roof was fastened and attached to the building by the usual and customary methods. A person is not excused for an act of God where his own negligence is a concurrent cause of the injury. Phillec v. Sanford, 17 Texas, 227. The court found here that this injury was not caused by the act of God, but that the landlord's negligence was the proximate cause. Without a statement of facts to test the correctness of these findings, we must accept them as being what the testimony established.

It is entirely immaterial in this case whether or not the roof was in this defective condition at the date of the lease. We have the court's finding that by the terms of the lease the landlord expressly contracted to repair and keep the roof in repair. This obligated him to put it in repair, if unsafe. when the lease was entered into, and if he was negligent in this, as the court has found he was, he is liable. Miller v. McCardell, 33 Atl. Rep., 445. The court did not hold, as stated in the third assignment, that there was an implied warranty by the landlord of the tenantable condition of the premises; on the contrary, it found that by the contract the landlord expressly agreed to repair and keep the roof in repair.

What we have said necessarily disposes of all of the assignments against plaintiff in error.

Affirmed.

TEXAS MIDLAND RAILROAD COMPANY v. SAMUEL FREY.

Decided February 20, 1901.

1.—Railway Company—Negligence—Passenger Alighting from Train.

The mere fact that a passenger was injured in stepping off a car, none of the attending circumstances going to show negligence, will not authorize a presumption of negligence on the part of the railway company.

2.—Same—Facts Not Showing Negligence.

Where a lady passenger was injured in alighting from a car, and the only

negligence alleged was a failure to provide a platform upon which she could alight and to provide a box or stool to aid her in reaching the ground, and the evidence was that there was a cement platform level with the tracks and eighteen inches below the step of the car, and that the passenger received careful assistance in alighting, and there was no proof of defects in the platform, or that it was not the usual and ordinary distance from the step of the car, or that it would have been safer to step on a box or stool, the evidence was not sufficient to authorize a recovery.

Appeal from Lamar. Tried below before Hon. E. S. Chambers.

Edgar Wright and *H. D. McDonald,* for appellant.

Wilkins, Vinson & Batsell and *Moore, Park & Birmingham,* for appellee.

FLY, Associate Justice.—This is a suit to recover damages arising from personal injuries alleged to have been inflicted upon the wife of appellee through the negligence of appellant. Upon the verdict of a jury, judgment was rendered in favor of appellee for $2000.

It was alleged in the petition that Sarah Frey, the wife of appellee, got on a passing train, belonging to appellant, at Terrell, Texas, to go to Ennis, Texas; that when the train reached Ennis no platform had been provided upon which Mrs. Frey could alight, and she was compelled to alight upon the ground; that there was no box or stool to aid her in reaching the ground, and although she exercised proper care in alighting she was severely and permanently injured. These were the only grounds of negligence alleged.

The uncontroverted evidence established that there was a gravel cement platform for the accommodation of passengers at Ennis, built on a level with the tracks, and that the platform was not more than eighteen inches from the lower step of the passenger coach. A man was employed at the depot to assist passengers on and off all trains, and he was assisted by the conductor. Mrs. Frey, the only witness who swore to the circumstances connected with her injury, testified as follows: "I arrived at Ennis at about noon time. It was raining and thundering and lightning when I reached Ennis. It was an awful pour, lots of rain; began raining in Terrell before I bought my ticket. When train reached Ennis I got off. A man assisted me to get off the car. He was the conductor, and was standing near the steps. I did not see anyone else. He assisted me by taking hold of my left hand. I stepped from the car to the ground; it was an awfully long step to me. I did not notice the long distance from the steps to the ground, before I made the step. It was raining and the conductor took hold of my left arm and assisted me off the train steps. I stepped right on to the ground, and did not see any box or stool there to step on. I then went into the depot." It is evident from all the circumstances that what Mrs. Frey called the "ground" was the gravel and cement platform. No effort was made to show that the step was more than eighteen inches from the

"ground" or platform, where Mrs. Frey alighted, but all the evidence of negligence introduced by appellee is quoted above.

It was the duty of the railway company to provide and maintain a safe way of reaching and departing from its cars at passenger stations, and it has been held in this State that such appliances must be "the safest that had been known and tested." Railway v. Wortham, 73 Texas, 25. If there was any testimony in this case that tended to establish a failure upon the part of appellant to furnish such appliances, and Mrs. Frey was damaged thereby, the jury was justified in the verdict upon which the judgment was based.

Under the facts in this case there could have been but one possible ground upon which the jury could have based the verdict, and that was the failure to have a box or stool upon which Mrs. Frey could step in getting off the cars. That there was a platform was uncontroverted, and there was no attempt to prove that it was defective, or that it was not at the usual and ordinary distance from the steps of the cars. A man was employed to assist passengers on and off the cars, and he or the conductor, or both, assisted Mrs. Frey in a careful manner to alight from the cars. There is not one single fact that tends to establish negligence upon the part of the railway company, unless it should be presumed from the fact that Mrs. Frey was injured in stepping off the car. Can negligence be thus presumed from the mere happening of the event, none of the attending circumstances tending to establish negligence? We think not. Railway v. Robinson, 73 Texas, 277; San Antonio Gas Co. v. Broadway, 60 S. W. Rep., 270.

There is no testimony that would show that it was safer to step on a box or stool without assistance than to alight on a solid platform with assistance and neither can it be said, in the absence of proof, that it is negligent to have the platfrom eighteen inches from the lowest step of the car.

In the case of Railway v Wortham, above cited, a box had been provided upon which passengers could alight, and it turned, throwing a lady to the ground and injuring her. The platform was shown to have been defective, and the box too narrow for the purposes for which it was used. It was said by the court: "It may be conceded that if appellants had a proper platfrom at the station upon which the passengers could have alighted, their duty as to this matter would have been discharged, and that they were not called upon to render personal assistance." In this case not only does the testimony fail to show an improper platform, but it tends to show a proper one, and in addition that proper personal assistance was given to persons alighting from the cars. Taflin v. Railway, 106 N. Y., 136; Kelly v. Railway, 112 N. Y., 443.

Because there is no evidence to sustain the verdict, the judgment is reversed and the cause remanded.

Reversed and remanded.

BISHOP HOLMES V. THOMASON BROS.

Decided February 27, 1901.

1.—Principal and Agent—Insurance Broker's Right to Recover for Premiums Paid.

Where an insurance broker was applied to by a firm to procure for them a policy upon their property, and he undertook to and did procure it, and in pursuance of the employment paid the premium and policy fee due thereon, he is entitled to recover from the firm the amounts so paid, if they are reasonable.

2.—Same—Delivery of Policy.

The delivery of the policy to the broker, if he was the agent or broker of the firm to procure it, would be a delivery to the firm.

Appeal from the County Court of Hunt. Tried below before Hon. R. D. Thompson.

H. Carpenter, for appellees.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by the appellant in the Justice Court against the appellees to recover $99, the premium on an insurance policy, alleged to have been paid by appellant for appellees on a fire insurance policy on their property, procured by the appellant for the appellees upon their written application therefor to appellant as their broker and agent. On appeal to the County Court, the appellant amended his pleadings by adding an item of $5 alleged paid by him as a policy fee in procuring the alleged insurance. The trial of the case then resulted in a verdict and judgment in favor of the defendants, from which this appeal is prosecuted.

There are a number of assignments complaining of the rulings of the court upon exceptions taken by appellant to appellee's pleadings which can not be considered, because it does not appear from the record that such exceptions were presented to and ruled upon by the court.

The other assignments are directed to the charge of the court, and to its action in refusing certain special charges requested by appellant's counsel, and to the sufficiency of the evidence to support the verdict.

It is useless to consider these assignments separately. It is sufficient to say that the court's charge submitted to the jury and required their findings in favor of appellant upon several irrevelant and impertinent issues before they could return a verdict in his favor. The special charges asked by appellant's counsel and refused by the court, while unnecessarily prolix, seek to strip the case of the impertinent issues presented in the main charge, and to have the substantial and essential issues, with the law arising from them, submitted to the jury.

If the appellees, in the manner and form alleged by appellant, applied to him as an insurance broker to procure an insurance policy upon their property, and that he, as their agent and broker, agreed with them and undertook to procure such policy as they applied for; and if in pursuance of such employment and agreement, he procured for them

such policy of insurance; and in its procurement paid the company issuing the same $99 as the premium therefor, and the further sum of $5 as a policy fee, and if said sums paid as the premium and policy fee were reasonable, then he is entitled to recover from appellees the money sued for.

If, on the other hand, the appellees never applied to appellant to procure an insurance policy upon their property; or if they did make such application, he never agreed with them to undertake to procure it, then, in either event, he is not entitled to recover, even though the evidence should show that he procured a policy of insurance on their property and paid the premium and policy fee therefor.

The delivery of the policy to appellant, if he was appellee's broker or agent to procure it, would be a delivery to them.

The issues of fact, and the law upon them, are as above stated. They should, in the manner indicated, have been submitted to the jury, and the jury not have been required to pass upon matters foreign to the issues in the case.

The judgment is reversed and the cause remanded.

Reversed and remanded.

J. B. PEIGHTAL AND WIFE v. COTTON STATES BUILDING COMPANY.

Decided February 27, 1901.

1.—Usury in Building and Loan Contract—Parol Evidence.

Parol evidence of antecedent and contemporaneous acts and declarations of the parties is admissible to show that a contract with a building and loan association, fair upon its face, was in fact only a device to cover usury, although such evidence tends to vary and change the written contract.

2.—Same—De Minimis Lex Non Curat.

The taking by a loan association, in each monthly payment to it, of an insignificant amount of interest in advance of the legal rate, is not usury where this was done for the sake of convenience, in getting an even number of cents, and with the intention of deducting the excess from the last paymnt.

3.—Same—Evidence of Intention.

Where the motive or intention actuating a party is the subject of inquiry, a witness may testify what his motive or intention was; and the rule applies where the question of usury is involved.

Appeal from Lamar. Tried below before Hon. E. S. Chambers.

Lightfoot, Denton & Long, for appellants.

Moore, Park & Birmingham, for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by the appellee, a Texas corporation, against appellants, J. B. and Nettie Peightal, to recover $500 and interest according to the terms of a contract between the parties, the terms of which will be hereinafter stated, together with

$50 attorney's fee, and for foreclosure of an alleged mechanic's lien on a certain house and lot situated in Ennis, Texas.

The appellants, defendants below, plead under oath that the contract declared upon was usurious; that the contract was devised by appellee and the National Building and Loan Association as a scheme to cover usury and exact from them more interest than they were allowed to charge by law, and that under it usury was exacted by appellee from and paid it by appellants; that as an inducement for them to enter into the contract, the appellee held out to them, through its agents and printed circulars, that appellants could borrow $500 at 10 per cent per annum with which to build their home; that in order to procure said loan it was necessary to take ten shares of stock, and that every payment of stock would reduce the principal of the debt each month, and that each monthly payment on stock would reduce the principal that much; that no loan could or would be extended beyond six years, or 72 months, and that at the end of that time the debt would be fully paid; that being induced by said promises and agreements, they entered into said contract, agreeing to pay the sum of $500, and secure it by a lien on their homestead in Ennis, and as a part of the contract of loan subscribe for ten shares of the company's stock, that the issuance of the stock was a mere pretense and device to cover usury; that at the time of its pretended issuance by the association, it immediately required it to be transferred back to the company; that it had never been in appellant's possession, but remained in the custody of the association from the date of issuance to the present time; that appellants did not make or want any investment in such stock, but said contract was made by both parties purely as a loan in order that appellants might borrow $500 to build their homestead, and for no other purpose; that the contract was dated August 25, 1892, but appellants had previously thereto been required to pay and had paid the association thereon $11 on August 5, 1892, and $7.70 on September 5, 1892, and that they had been required by the association to pay, and had paid regularly on the 5th day of each month thereafter, the sum of $7.70 for the period of seven years, that is to say, eighty-four months, making in the aggregate $640.10.

That there was at no time, of such payments, the amount of interest due from appellants as was demanded and paid; that appellee wholly failed and refused to carry out its promises and agreements to apply the payments on stock to reduce the principal of the debt each month, as it had agreed, but continued to demand and require appellants to pay the same amounts of the usurious interest on the last month of said eighty-four months as had been required on the first, and that such interest was largely more than 10 per cent per annum. Appellants denied that they ever made default for three months, or for any other time. That the principal of the debt was fully paid, and that all interest payments on said debt were usurious, and that they were entitled to recover double the amount so paid. They prayed for a cancellation of the contract sued on, and for judgment against appellee for $800.

By a supplimental petition the appellee denied the allegations in appellants' cross-bill, and alleged that the payments made each month were made and appropiated as follows: $4.20 interest and premiums, and $3.50 per month on stock. It also plead limitation of two years upon the penalty claimed by appellants for usury.

By supplimental answer appellants averred that the subscription of stock and loan of the money were one and the same transaction; that the agreement to mature the stock and pay the debt in six years was a material inducement held out to them to take the loan. That the plea of limitation does not apply, because the contract was and is a continuous one, extending from August 5, 1892, to August 5, 1899, inclusive, and that the applications of said payment were made and received in writing each month during such time.

After hearing the evidence the court instructed the jury as follows: "In this case I instruct you to render a verdict for plaintiff. You will calculate the interest on the payments made on the amounts paid, and due on the ten shares of stock, at the rate of 6 per cent per annum, and for forty-two and one-half months, and add that amount to the amount of dues paid on stock, deduct the total thus arrived at from $500, the amount of credits and interest, amounting to $360.40, which deducted from $500 would leave $139.60, and calculate the interest on the amount to this date, that is $139.60, at the rate of 10 per cent from September 5, 1899, and return your verdict for that amount, with foreclosure of lien. You will also return a verdict for reasonable attorney's fees."

In obedience to this charge the jury found a verdict in favor of appellee for $147.86, with foreclosure of lien on the land described in its petition, and also found for plaintiff $25 for attorney's fees. Upon this verdict the judgment appealed from was rendered.

So much of the evidence as is necessary to a consideration of the questions involved in this appeal may be stated as follows: On August 5, 1892, the National Building and Loan Association, the name of which was afterwards changed to "Cotton States Building Company," issued to Nettie Pieghtal, one of the appellants, ten shares of "Class A" stock. In her written application to the association for the stock, Mrs. Peightal stated that she had read its literature and understood the amount of dues required to maintain the shares to be 35 cents per month, on each $50 share, payable on or before 5th day of each month, making a total monthly payment of $7; and she agreed to abide by all the terms and conditions and by-laws of the association, and to comply with all its rules and regulations. On the margin of the application was written in red ink: "Agents are not allowed to make any promise not in conformity to our printed matter."

The by-laws of the association provide that all holders of "Class A" shares shall be entitled to a loan of $50 on each share held by him, such loans to be secured by first lien on real estate. That each loan shall be based on shares in "Class A" equal at maturity to the amount of the loan; that such shares must be six months old, or six monthly installments

must have been paid in advance before an application would be considered. That if any shareholder shall fail or neglect to pay the interest on his loan, or his regular monthly installment, or other fees, for three months, or in any way fail to comply with his contract, the association may compel payment of principal, interest, fines and dues by proceeding to foreclose the lien or other securities, which shall at once become due and payable, and the association may cancel and treat as forfeited the shareholder's stock, whether deposited as collateral security or not, and the payments thereon shall be forfeited to the shareholders. That the certificate, terms, and conditions of shares of the association and its by-laws form the contract with the share-holders; and the application for a loan shall form a part of the contract with the borrower. That no agent who solicits shares for the association shall have the right to promise a loan at any time, or to sell shares with the understanding that a loan will be made until it has been first approved by the directors of the home office. Nor shall he have authority to change or alter any of the terms or conditions contained in its literature.

The prospectus, under the title "Homes Make Happiness," issued by the association and read and considered by appellants before applying for shares and a loan from the company, contains the following: "The object of the National Building and Loan Association is to assist its members, either to obtain homes, or invest savings in a safe and profitable way. The interest of the borrower is linked with that of the investor in such manner that both is materially advanced. When the payment of the shares, together with the net profit, amounts to the maturity value, they shall be fully matured and paid, and no more payments shall be required, and the holder shall be entitled to receive the full face value of each share. 'Class A' or 'General Shares.'—The maturity value of this class of shares is $50 each, and are estimated to mature in about seventy-two months from their date, and the monthly installment, which is 35 cents on each share, must be paid on or before the 5th day of each month, without notice. An applicant for a loan must carry shares in 'Class A' equal at their maturity to the face value of the loan. His shares must be six months old, or he must pay or cause to be paid six months' installments, in advance, before his application for a loan will be considered. Loans are not made for longer than six years." In said prospectus, under the title 'Illustration,' is the following, showing the estimated cost of a $1000 loan to the holder of twenty shares in 'Class A':—

"Membership fee	$10.00	
"Monthly installments	7.00	
"Monthly interest	8.33 1-3	
"Contingent fund	1.00	
"Seventy-two monthly installments	$16.33 1-3	$1,176.00
"Cancellation fee, 25 cents per share		5.00
"Total cost to borrow in 72 months		$1,191.00"

And under the head of "Safety of the Investment" is the following: "The association takes the maximum risk at the time the loan is made, and every payment of monthly installment thereafter reduces the debt, while the security remains the same. All shares in 'Class A' are estimated to mature in about six years from their date, and at maturity any member may withdraw such shares and receive $50 therefor. While it can not be stated with absolute certainty what time it will require for these shares to mature, yet the experience of building and loan associations, and reliable, safe mathematical calculations make six years a conservative estimate for the maturity of shares under this plan."

On the 25th day of August, 1892, the appellants and appellee entered into a written contract, properly signed and acknowledged, whereby the latter agreed to build a house, according to certain plans and specifications, for appellants on certain lots situated in Ennis, Ellis County. And in consideration of this agreement appellants agreed to pay the appellee $500, and to pay said association the sum of $3.50 on their ten shares of stock until the maturity of said shares, as provided for in the plan and by-laws, which were made a part of the contract. They also agreed to pay, as interest on the $500, the further sum of $4.16 2-3 per month from the 25th day of August, 1892, till the maturity of their ten shares of stock. The contract contained provisions in relation to insurance, taxes, etc., not necessary to state here. To secure the payment of the above sums of money, interest due thereon, all dues and fines, as prescribed in the by-laws of the association, and reasonable attorney's fees (if judicial proceedings should be used in collecting said sums of money, or in foreclosing the lien given), it was agreed between the parties that the association should have a mechanic's and builder's lien on the house and lot.

The house was built according to plans and specifications with the $500 loaned and furnished by the association, half of which was paid out by the association on October 15, 1892, and half on the last of that month.

The payments made by appellants, excluding membership fee of $7.50, are as follows:

"Advance payment on stock	$21.00
"Monthly payments on stock, $3.50 Aug. 5, 1892, to Aug. 5, 1899, inclusive	294.00
"Aggregate payments on stock	$315.00
"Interest payments, $4.20 Aug. 5, 1892, to Aug. 5, 1899, inclusive	352.80
"In full payments	$667.80"

No payments were made after Aug. 5, 1899.

Appellee's secretary, W. B. Connor, testified that "the exact amount of interest on the $500 loaned, at the rate of 10 per cent per annum, would be $4.16 2-3 per month, but we collected $4.20 per month be-

cause it was a small matter and even figures. These collections were made each month to local boards, on collection sheets sent out by the home office, and the collection sheets were sent out showing $4.20 per month to save trouble in going into fractions."

Opinion.—The principal questions raised by the assignments are: (1) Were antecedent and contemporaneous acts and declarations of the parties admissible in evidence for the purpose of showing the contract was a device to cover up usury? (2) Was it error for the court, under the facts stated, to withdraw the question of usury from the jury, and peremptorily instruct a verdict for the defendant? If the first question should be answered in the affirmative, it might not be necessary to consider the second. But as both are germane to the issue of usury, and so intimately connected as to be hardly severable, they will be considered together.

Upon the first question the trial court ruled, when such testimony was offered by the appellants, that neither antecedent nor contemporaneous acts and declarations were admissible upon the issue, because they would tend to change or vary a written contract. Upon its face the contract is not usurious. Building Assn. v. Goforth, 59 S. W. Rep., 871.

If such antecedent or contemporaneous acts and declarations of the parties to a contract as surround and are connected with the transaction can not be used to illuminate and cast the light of truth upon it, then, however much it may have been intended as a device to hide usury, it must remain forever shrouded in darkness, and our law against exorbitant interest rendered a dead letter.

In Mitchell v. Napier, 22 Texas, 128, it is said: "It is quite immaterial in what manner or form, or under what pretense it is cloaked, if the intention was to receive a greater rate of interest than the law allows for the use of money, it will vitiate the contract and taint it with usury. Whether the transaction was so intended, where, upon its face, it does not appear to be usurious, is a question of intention for the decision of the jury." In the construction of a contract alleged to be usurious, the chief aim should be to ascertain the intention of the parties; and the mere form of the contract is immaterial, except in as far as it is one of the most conspicuous circumstances evidencing the intention of the parties. Webb on Usury, sec. 203.

In Moroney v. Loan Association, 116 North Carolina, 21 Southeastern Reporter, it is said: "The courts have always said that in usury cases they 'look through all disguises to the real nature and truth of the transaction.' The shifts and devices of avarice are countless in attemping to evade the protection which the law-making power sees fit to erect against its exactions. Calling 'interest' by the name of 'premiums,' 'fines.' and 'penalties' is a threadbare device."

In Rowland v. Association, 116 North Carolina, 877, 22 Southeastern Reporter, the same court said: "We reiterate what this court said in the case of Mills v. Association, 75 North Carolina, 292,—'We know

of no device or cover by which these associations can take from those who borrow their money more than the legal rate of interest, without incurring the penalties of our usury laws. Calling the borrower a "partner," or substituting "redeeming" for "lending," or "premium" or "bonus" for an amount which they profess to have advanced, and are yet withholding; or "dues" for "interest," or any like subterfuge, will not avail. We look to the substance.' "

Whether or not a contract is a device to cover usury can not ordinarily be determined as a matter of law. "It is a question of fact to be determined on trial where the court can *go behind the returns,* and inquire and ascertain the intent and motives of the parties." Stephens v. Staples, 65 N. W. Rep., 959. Where the transaction disclosed by the evidence is per se usurious, the court is authorized to charge the jury to that effect. If, however, there is doubt as to whether the transaction is a cover for usury, or a perfectly fair one authorized by law, then it is a question for the jury to determine, from all the facts and circumstances of the case, whether the transaction disclosed is bona fide, in the ordinary course of business, free from the taint of usury, or whether it was a mere cloak and device, under the form of an ordinary business transaction to obtain more than legal interest. Bank v. Spencer, 107 Ga., 629, 33 S. E. Rep., 878; Callaway v. Butler, 97 Ga., 356, 7 S. E. Rep., 224.

An usurious agreement is not absolutely void; it is illegal, and this fact it would be probably impossible to prove except by oral testimony. Webb on Usury, sec. 425. Hence it was held by this court in Roberts v. Coffin, 22 Texas Civil Appeals, 127, that a contemporaneous parol agreement to pay 18 per cent interest, instead of 10, as stipulated in the contract, could be proven on the issue of usury. And we understand the law to be firmly settled that any evidence surrounding and so connected with a transaction as will throw light upon it and disclose, or tend reasonably to show, its true character, is admissible upon the issue of usury, although the contract is in writing and appears upon its face fair and legal.

In this case the appellants sought to show that their sole object in subscribing for the shares of the association was to obtain the loan of $500, and that their purpose was known to its agent with whom the loan was negotiated; that the stock subscription was a part of the transaction which culminated in the contract sued on, and that both parties, when the loan was being negotiated for, considered the so-called monthly stock installments as payments on the principal, and so treated them in estimating, from appellee's prospectus, when the debt would mature. If there was an understanding between the parties at the time appellants subscribed for the stock that Mrs. Peightal was not in fact to become a stockholder in the association, but subscribed for the shares simply for the purpose of borrowing money, with the understanding on the part of appellee, or the agent representing it in the transaction, that the monthly stock payments should be received as payments of and in reduction of

the debt, the transaction would be usurious (Association v. Thompson, 58 Southwestern Reporter, 202), and the stock subscription and the monthly installments provided by the contract as payments thereon would be regarded as subterfuges, made simply for the purpose of hiding the true character of the transaction. If, however, although it may have been appellant's purpose in subscribing for the stock to borrow money, and though this purpose may have been known to appellee, yet if it was the intention of the parties that the stock installments were to be received by the association as bona fide payments on appellant's shares, and not as payments upon and in reduction of the principal on the money loaned, the transaction would not be usurious. In determining this question, it would be legitimate to inquire what was done by the association with the money it received from its borrowing members purporting to be monthly payments on their stock subscriptions. Did the association appropriate it as its own, ignoring any right or interest of such borrowing members in it? If so, a jury might consider such appropriation as a cogent circumstance tending to show the required subscription for stock was simply a device to conceal usury. On the other hand, did the association, in the interest of its members, invest or seek to invest the money received from its borrowing members with a view to crediting them upon the stock subscribed for with the profits of such investment? If it did, this would tend strongly to show the transaction was not tainted with usury. Association v. Goforth, supra.

The contention of appellants, that the taking by appellee as interest of $4.20 instead of $4.16 2-3 per month, ipso facto shows usury can not be maintained. "Where the amount of interest taken above the legal rate is trivial, the maxim 'de minimis non curat lex' is applicable. The taking of an insignificant amount would have a tendency rather to disprove than to prove usury; for anyone intending to take more profit upon a loan of money than the law would hardly be content with an exceeding small amount." Webb on Usury, sec. 210. Besides, it is apparent that this insignificant amount in excess was paid simply for the convenience of both parties, with the intention of deducting such excess from the last payment.

Some question is made as to whether it is competent to permit the parties to the transaction to testify to their intentions. In cases where the motive or intention actuating a party is the subject of inquiry, it has been held in this State that the witness could testify what his motive or intention was. Hamburg v. Wood, 66 Texas, 168; Brown v. Lessing, 70 Texas, 545; Sweeney v. Conley, 71 Texas, 545. And it seems the same rule applies in cases where the question of usury is involved. Webb on Usury, sec. 424.

We are of the opinion that the court erred in refusing to admit the parol testimony offered by appellants to show that the contract was usurious, and in peremptorily instructing the jury to find for the plaintiff. Therefore, the judgment is reversed and the cause remanded.

Reversed and remanded.

H. C. THOMAS v. WESTERN UNION TELEGRAPH COMPANY.

Decided February 27, 1901.

1.—Telegraph Company—Damages for Mental Suffering—Law of Place, Not of Forum, Governs.

Damages for mental suffering resulting from the nondelivery of a telegram sent from one point in Arkansas to another point in that State can not be recovered in a Texas court by reason of the mere residence of plaintiff in Texas, since mental distress is not recognized as an element of damage by the law of Arkansas, and the right of recovery is governed by the law of the place where the contract was made and the injury occurred, and not by the law of the forum.

2.—Same.

The rule is not changed by the fact that at the city of Texarkana, where the message was sent, and which city is about equally divided by the State line between Arkansas and Texas, the telegraph company has no office except on the Arkansas side, there being no statute requiring that the company have any office at that point on the Texas side.

3.—Same.

Nor does the fact that plaintiff, after the failure to deliver the telegram, with its consequent disappointment and mental distress, returned from Arkansas to Texas, and there continued to suffer much distress, alter the case so as to give him a right of action in Texas.

Appeal from Camp. Tried below before Hon. J. M. Talbot.

T. E. Weber, Sheppard & Sheppard, and *J. F. Jones,* for appellant.

George H. Fearons and *M. R. Geer,* for appellee.

JAMES, CHIEF JUSTICE.—The action was brought in the District Court of Camp County, Texas, alleging negligence in failing to properly transmit and deliver a message dated August 11, 1899, delivered to defendant's agent at its office in Texarkana, in Arkansas, addressed to plaintiff at Hatfield, Ark., as follows: "Hattie is very low; come at once. C. C. Buckner." The petition alleges that the sum of 25 cents was paid defendant for said message, and alleged mental distress resulting to him from said negligence, laying the damages therefor at $2000.

The case went off on a plea in abatement to the jurisdiction of the court, upon the ground that damages for mental anguish in such cases can not be recovered under the laws of Arkansas, and that a demand for the sum of 25 cents was not within the jurisdiction of the court to try and determine. The court sustained the plea, and rendered judgment for defendant thereon.

The evidence taken shows these facts: That at the time of this transaction, Thomas resided in Texas, and had left home and was in Hatfield, Ark. When he left home he knew that his daughter Hattie, the wife of C. C. Buckner, was sick at Fort Lynn, Ark. The message was delayed in transmission and delivery, and he thereby lost the opportunity to reach his daughter before her death. It was in testimony

that C. C. Buckner had telephoned from Fort Lynn, Ark., to W. R. Lambeth, at Texarkan, Ark., who, from his store in Texarkana, Ark., telephoned to defendant's office in Texarkana, Ark. That defendant's agent declined to take the message by telephone, and requested him to come to the office, which he did, and the message was received and paid for. No conversation of any kind relative to the message was had. After the message was delivered to Thomas at 6:15 p. m., August 12th, he sat up all night and took the 5:40 passenger train on August 13, reached Texarkana about 10:40 a. m., and telephoned from Texarkana, Ark., to Fort Lynn, and ascertained that his daughter had died and was then being buried. That he suffered great disappointment and distress. It was shown that Texarkana has a population of about 20,000; that the State line about equally divides the city, that defendant had no office on the Texas side, but had its office on the Arkansas side, and that these conditions remain the same. It was proved that damages for mental distress alone are not a subject of recovery in Arkansas. That defendant company was chartered under the laws of New York, and had its domicile and principal office in New York city, where its president resides. That it was not chartered under the laws of Texas or Arkansas; that its wires connect and traverse all the States of the Union, and it does business in Texas and elsewhere. After experiencing disappointment and grief over this matter in Arkansas, plaintiff came back to Texas and continued to so suffer.

Opinion.—The contentions of appellant are: (1) That defendant is liable to be sued by appellant, and according to the rules governing in Texas, because at the time of his injuries and when this suit was brought he was and is a citizen of Texas, and defendant was and is a corporation doing business in Camp County, Texas, and had and has an agent in Pittsburg, Camp County, Texas. (2) That defendant is liable because the courts of Texas will not deny a citizen a right given him by the laws of Texas when the office of the defendant where the citizen lives is situated in the same city, but just across the state line in Arkansas, when he is compelled to go into said office to send the message. (3) That the suit is for damages arising from a breach of contract sounding in tort, and in such a case the laws of Texas will govern in the matter of damages. (4) That the mental anguish and disappointment were suffered in Texas, and therefore the redress should be made under the laws of Texas, although the wrong that caused them was committed in Arkansas. (5) That this was a transitory action and was cognizable by the courts of Texas, regardless of whether the cause of action is ex contractu or ex delicto.

All the facts connected with this transaction occurred in Arkansas, and the facts that are claimed to have the effect of making the case one determinable by the laws in force in Texas are that plaintiff was a citizen of Texas, and was only temporarly in Arkansas; that plaintiff, after learning of the death of his daughter in Arkansas, returned into Texas,

and his grief continued there; and the fact that defendant, under the circumstances, maintained its office for Texarkana and that neighborhood on the Arkansas side, and Texas citizens were compelled to go there to send messages.

We are of opinion that so long as the laws of this State do not require, under such conditions as exist at Texarkana, that defendant must have an office within this State, defendant had a perfect right to have and maintain the office on the Arkansas side, and until we have legislation on the subject, there is no ground for saying that this interferes with any public policy of this State.

The mere fact that plaintiff was and is a citizen of Texas can not be given the effect of drawing to the courts of this State the power to give redress for a matter which was not actionable or remediable in the foreign jurisdiction where it took place.

The cause of action, so far as it is for mental suffering, has the appearance of tort, in being injury to the person. The demand for the price of the telegram is strictly for breach of contract. Telegraph Co. v. Adams, 75 Texas, 537. The statute of limitations applicable to a demand based on mental suffering is that applied in cases of personal injuries. Kelly v. Telegraph Co., 17 Texas Civ. App., 344. Nevertheless, the cause of action is for damages growing out of a breach of contract. Telegraph Co. v. Coffin, 88 Texas, 96; Garland v. Telegraph Co., 76 N. W. Rep., 762.

We are of opinion, whether we view this case from the standpoint of a tort or a breach of contract, that plaintiff has no right of action here for damages sustained from mental anguish alone.

That the law of the forum will govern in matters pertaining to the remedy, is the statement of a familiar rule. By remedy in this connection is meant such matters as the character and form of action, the admissibility of evidence, procedure, the mode of redress, limitations, execution of judgments, and the like. The right acquired and the obligations created and all matters pertaining to the essence of the contract are determined by the lex loci contractus. The damages to be allowed, if fixed or limited by such law, pertain to the right and not to the remedy. This affects both the cause of action and the liability of defendants. This rule can not, for any reason that we can conceive, be different in cases of contracts and torts. Railway v. Dyke, 45 N. Y., 113; Consequa v. Wellings, 6 Fed. Cases, 336; Pritchard v. Norton, 106 U. S., 132; Burnett v. Railway, 34 Atl. Rep., 972; Curtis v. Railway 74 N. Y., 116; Railway v. Brown, 54 S. W. Rep., 867; Telegraph Co. v. Preston, 54 S. W. Rep., 650; Pullman Car Co. v. Lawrence, 22 So. Rep., 53; Walsh v. Railway, 36 N. E. Rep., 584; Railway v. Babcock, 154 U. S., 190. We regard the case of Railway v. Jackson, 89 Texas, 115, as strongly in favor of the doctrine that immunity from certain damages by the law of the place where the matter arose, is a substantial right.

The transaction in question took place wholly in Arkansas; and in accordance with the views above expressed the amount of recovery, or the

subjects in reference to which damages are to be allowed, will be governed by the law of that State. The testimony shows that damages for mental suffering alone can not be recovered there. The court did not err in sustaining the plea. Haddock v. Taylor, 74 Texas, 216; McFadin v. San Antonio, 22 Texas Civ. App., 140.

We further conclude that the fact that Thomas, after the failure to deliver the telegram in time to enable him to go immediately to his daughter, and after receiving the news of her death, all of which took place in Arkansas, where his disappointment and distress begun, came into Texas and continued there to suffer disappointment and distress, does not alter the case.

The judgment is affirmed.

Affirmed.

Writ of error refused.

FIFTH DISTRICT, 1901.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. GENEVA HUMPHREYS.

Decided February 2, 1901.

Railway Company—Negligence—Injury to Passenger Re-Entering Train.

A passenger train having stopped at a dinner station, with announcement that it would remain there twenty minutes, a lady passenger alighted from it and went across the street to purchase some stamps. As she returned, five minutes later, she saw the train moving forward, and supposing that it was pulling out, she attempted to board it, and just as she did so, the train gave a violent jerk, whereby she was thrown to the ground and injured. She was not seen at the time by any of the train operatives, being on the opposite side from the depot, and the train was being moved up in order to clear a highway crossing there. Held, that there was such negligence as authorized a recovery by the passenger for the injuries so received, since the train operatives ought to have foreseen, at the time of the jerk, that some passenger might be then about to enter the train.

Appeal from Upshur. Tried below before Hon. J. Gordon Russell.

Sam H. West and *Marsh, McIlwaine & Fitzgerald,* for appellants.

F. J. McCord and *Barnwell & Eberhart,* for appellee.

TEMPLETON, ASSOCIATE JUSTICE.—On October 11, 1898, the appellee, Miss Geneva Humphreys, was a passenger on one of appellant's trains, en route from Waco, Texas, to Calhoun, Ga. When the train

reached Big Sandy station the porter announced a stop of twenty minutes for dinner. Miss Humphreys did not take dinner, but desiring some stamps, left the train and went to the postoffice, which was about 100 feet distant from the train on the side opposite from the depot. After getting the stamps she started to return, when she noticed that the train was in motion. Believing that it was pulling out of the station, she ran to it and attempted to get on while the train was moving. In doing so, she was thrown down by a sudden jerk of the train and injured. She brought suit and obtained a judgment from which this appeal is prosecuted.

The train had been at the station only five or six minutes when the accident occurred. It was not resuming its journey, but was pulling up to clear the dirt road and the track of the Texas and Pacific Railway Company, which crosses the track of appellant at that place. When the original stop was made at the station, the train stood directly across both the said dirt road and the said railroad track. It was stopped there for convenience in landing passengers and baggage, and, as soon as this was accomplished, it was pulled up far enough to clear the said crossings, and again stopped to await the expiration of the time given for dinner. These movements of the train were usual and customory and were proper, if not necessary, under the circumstances. The train servants were on the depot side of the train, which was their proper position, and they did not know the appellee had left the train until after the accident.

The appellee's trunk was on the train, checked through to her distination in Georgia; her ticket from Waco to Texarkana was in the possession of the conductor; she was untraveled and alone, was a stranger at Big Sandy, and was ignorant of the reason for the movement of the train.

The court charged the jury that the appellee did not lose her status as a passenger by leaving the train, but that, if she acted negligently in attempting to re-enter it, she could not recover.

A through passenger who has left the train at an intermediate station has a right to re-enter the train, and, when attempting to do so at a proper time and place and in a proper manner he must be regarded as a passenger and entitled to protection as such. His motive in leaving the train is immaterial. Railway v. Overfield, 19 Texas Civ. App., 440; Railway v. Cooper, 2 Texas Civ. App., 42. It depends upon the circumstances as to what is the proper time, place, and manner of re-embarking on the train. Usually, the passenger should present himself on the depot platform at a time when passengers are being received on the train by the train servants, and get one while the train is standing still, but he will sometimes be excused from doing so. What circumstances will excuse him is always a question of fact for the decision of a jury, unless, as a matter of law, they are insufficient to constitute an excuse. In this case we can not say, in view of the appellee's situation and surroundings, that she was not justified in attempting to board the train as she did. If she was justified in so attempting to board the

train, then she must be held entitled to the protection of a passenger at the time. She could lose her right to such protection only by attempting to board the train at an improper time or place or in an improper manner.

The negligence charged against appellant is that, just as appellee was getting on the train, it was given a sudden jerk whereby she was thrown to the ground and injured. On this issue the jury was instructed that railway companies are not insurers of the safety of their passengers, but are bound to use such care as very prudent and competent persons would use under the circumstances, and that if the jury believed the train was given a sudden jerk as alleged, and the appellee was thereby thrown down and injured, and that the said act of the employes of the appellant in giving the train a jerk constituted negligence, they should find for appellee. The converse of this proposition was given in charge to the jury, and the jury was further instructed that if the servants of appellant in charge of the train did not know of the position or acts of appellee until after the accident, or unless they ought reasonably to have forseen that appellee or some other passenger might be in the act of getting off or on the train and be injured as a result of a sudden and careless movement of the train, to find for appellant.

We think these charges stated the law as favorably to appellant as it had a right to demand. We know of no rule of law which authorizes the operatives of a passenger train to be careless in the handling of it. If the employes of appellant in charge of the train needlessly and carelessly gave the train a sudden jerk just as appellee was in the act of getting aboard, whereby she was injured, and if she was where she had a right to be, and was exercising ordinary prudence, then such carelessness was negligence as to her, and the company must be held liable. It is not necessary for the train servants to know exactly how their negligence will operate to the injury of the passenger. It is sufficient if they do not use the care that very cautious and prudent men would exercise under the circumstances, and a passenger, not himself in fault, is thereby injured. Every movement of a passenger train must be made with reference to the safety of passengers, and the utmost care exercised at all times to avoid injury to them.

Counsel for appellant strongly present their contention that the evidence is not sufficient to support the judgment, but after a careful consideration of the facts as disclosed by the record before us, we have concluded that we would not be authorized to disturb the verdict.

We find no merit in any of the errors assigned, and the judgment is affirmed.

Affirmed.

Writ of error refused.

CAROLINA LAGUERENNE ET AL. v. L. J. FARRAR, ADMINISTRATOR, ET AL.

Decided February 9, 1901.

1.—Limitations—Express Trust.

In 1840 L. conveyed to H. an eleven-league grant of land, and H., owning also another such grant, executed an instrument by which he conveyed to L. one-third of the proceeds which he might receive from sales by himself of any portions of the twenty-two leagues of land and bound his executors and administrators to convey any part of the lands that might remain unsold at his death to such persons as L., her husband or heirs, might order. Held, that as to the proceeds of sales made thereunder, the instrument was not a complete declaration of an express, executed trust against which limitations would not run until repudiation and notice thereof brought home to the beneficiary, but was an executed trust against which the defense of limitations could be interposed.

2.—Same—Repudiation of Trust—Notice.

In order to render the defense of limitations available it is not necessary that there should be a formal renunciation of the trust by the trustee and actual notice thereof to the beneficiary, but it is sufficient if his acts are equivalent to a repudiation and the circumstances are such that the beneficiary must have morally known therefrom that he had abdicated the functions of his office and was converting the trust property to his own use.

3.—Same—Executory Contract to Convey Land.

In so far as the instrument executed by H. related to the lands unsold at his death, it was not an absolute conveyance, but an executory contract for the sale of land, against which the ten years statute of limitations was applicable.

Appeal from Limestone. Tried below before Hon. L. B. Cobb.

Kimbell Bros. & Blackman, for appellants.

Farrar, Williams & Farrar and *Sam R. Frost,* for appellees.

TEMPLETON, ASSOCIATE JUSTICE.—On July 28, 1840, George L. Hammeken, J. T. Laguerenne and his wife, Petra Laguerenne, executed an instrument which reads as follows: "Know all men by these presents: That I, Geo. L. Hammeken, a resident citizen of the Republic of Texas, do hereby acknowledge to have received from Petra de la Caudra, wife of John Theodore Laguerénne, the sum of one dollar, for which consideration and the additional consideration of many important services rendered to me by them, I hereby make over, sell and convey to the said Petra Lopez de la Caudra, her heirs, executors, administrators and assigns, one-third of all moneys which I may hereafter receive from the sale of any portion or portions of twenty-two leagues of land, lying and situate in the aforesaid Republic of Texas, which was originally granted in sale by the government of the State of Coahuila and Texas unto Manual Crecencio Rejon and Juan Nepomuceno Acosta, sixteen leagues of which are situated on the right and left banks of the rivulet Navasota, the remaining six leagues are situated on the river Trinity, and for a more particular description of same, I refer to the authenticated copies of the original deposited by me in the Gen-

eral Land Office of the Republic of Texas; and should any portion of the aforesaid twenty-two leagues of land remain unsold at my death, I hereby bind my executors, administrators, and assigns to have the same surveyed and to make titles for the same to such person or persons as the said Petra Lopez de la Caudra, her husband, her heirs or assigns, may order. In witness whereof we have hereunto interchangeably set our hands and seals in the city of New Orleans, this twenty-eighth day of July, A. D., 1840."

The said instrument has the following indorsed on the back thereof, viz: "Deed for one-third of twenty-two leagues of land, George L. Hammeken to Petra L. Laguerenne." The instrument and indorsement were written by Hemmeken. The instrument was never recorded. It remained in the custody of Mrs. Laguerenne during her life, and after her death was held by her daughter, Carolina Laguerenne, one of the appellants.

Hemmeken in his lifetime sold 44,133 acres of said lands for $55,477. He died in 1881, and in 1882 L. J. Farrar qualified as administrator of his estate. The administrator sold 6199 acres of said lands for $17,992. Neither Hammeken nor the administrator ever accounted to the Laguerennes or their heirs for any part of the proceeds of the said sales. There are now unsold of said two surveys about 17,500 acres of land.

J. T. Laguerenne died in 1858, and Mrs. Laguerenne in 1880. The appellants are their sole heirs, and brought this suit on March 13, 1899, against the administrator and the heirs of Hammeken to recover the unsold portion of the said surveys and one-third of the proceeds of the sales made by Hammeken. There was a trial by the court without the intervention of a jury, and judgment was rendered for the defendants, from which judgment this appeal is prosecuted.

The two surveys in question, each of which contains eleven leagues of land, were granted by the government of Coahuila and Texas in 1833 to J. N. Acosta and M. C. Rejon, respectively.

On April 11, 1836, M. C. Rejon conveyed the Rejon survey to Mrs. Laguerenne. On the same day Laguerenne executed to Hammeken a power of attorney authorizing him to act for Laguerenne in the sale and management of said survey. On September 27, 1836, Laguerenne and wife, by deed reciting an expressed consideration paid, conveyed the Rejon survey to Hammeken. On July 28, 1840, Hammeken was the owner of the Acosta survey. On that day Laguerenne and wife executed a deed to Hammeken, again conveying to him the Rejon survey. No reason for the making of this second deed is disclosed by the record. Its date is the same as that of the said instrument above set out.

In defense of the suit of appellants for the recovery of one-third of the proceeds of sales made by Hammeken, the appellees interposed a plea of limitations. The appellants, in avoidance of the plea, contend that the said instrument is a completed declaration of an express executed trust, against which limitation will not run until after renuncia-

tion of the trust by the trustee and notice thereof to the beneficiary. On this issue it was shown that Laguerenne and wife and their heirs were citizens of the Republic of Mexico, and resided about 1500 miles distant from the lands in controversy; that the Spanish language prevails in Mexico and the English language in Texas, where the lands are situated and where Hammeken resided; that there was little communication between the two countries; that shortly before Mrs. Laguerenne's death, Hammeken told her that the lands had been lost by litigation and taxation, and that he had never made any sales, and that this was the reason why he had never accounted to her for anything on sales. The appellees did not actually know that these statements were false until within two years before the bringing of this suit, but they never made any effort to learn the facts, and they could have learned the facts many years sooner, had they used reasonable diligence. The circumstances were sufficient to put Laguerenne and wife and their heirs upon inquiry as to the failure of Hammeken to report and account for sales, and the slightest inquiry would have developed the facts, as Hammeken was openly making sales and notoriously treating the lands and proceeds of sales as his own.

The explanation of Hammeken as to why he had never rendered an account of sales was insufficient to impose upon any person of reasonable prudence, or to prevent inquiry. Hammeken's acts for nearly forty years before his death amounted to a repudiation of the trust and of his obligations under said instrument, and the least care for their own interests would have brought home to the Laguerennes knowledge of that fact.

Construed by itself alone, the instrument under consideration, in so far as it relates to proceeds of sales of the lands, appears to be an assignment of one-third of such proceeds. This would be sufficient to create a relation in the nature of a trust between Hammeken and the Laguerennes, but the trust would not be of that character against which limitation would not run. Phillips v. Holman, 26 Texas, 276. The appellants contend, however, that the lands in controversy were in fact the property of the Laguerennes, and that the legal title thereto had been placed in Hammeken for the purpose of facilitating sales, and that the instrument should be construed in the light of such facts. At the time of the execution of the instrument Hammeken held the legal title, and the apparent equitable title, to both surveys. There is nothing in the record to indicate that the Laguerennes ever had any interest whatever in the Acosta survey. They once held the title to the Rejon survey, but had conveyed it to Hammeken about four years before the date of the execution of the said instrument. The only fact in the record which suggests that this conveyance was not absolute in fact as well as in form was the making of the second deed to said survey on the day of the execution of the said instrument. The making of the second deed may have indicated a then existing interest in the Laguerennes in the land, but there may have been other reasons for the act. After the

death of the parties and the lapse of nearly sixty years, presumptions in derogation of the legal title can not be indulged. We are bound to accept only such presumptions as necessarily arise from the facts proven, and we seriously doubt if the bare fact of the making of the second deed contemporaneously with the execution of the instrument demands the presumption that the first deed was not intended to convey title.

But even if we construe the second deed and instrument together and hold that the Laguerennes then had an interest in the Rejon survey, the trust created by the deed and instrument would be, in some sense, executory, since it required action on the part of the trustee, that is, the sale of land and receipt of the purchase money, to vitalize the trust and impose on the trustee an obligation to account to the beneficiary. But the term "executory trust" is not generally used in this sense; it is usually held to refer to the manner and perfection of creating the trust, rather than to the action of the trustee in administering the same. A trust is said to be executed when all its terms and limitations are so clear and certain that the trustee has nothing to do but to carry out all the provisions of the instrument according to its letter. It is not always an easy matter to distinguish between an executed trust and an executory trust. Without entering upon an extended discussion of the question, we will say that, in our opinion, the trust under consideration was executory, for the reason that the interest of the parties, under the instrument, depended upon contingencies, the happening of which could not be foretold. The contingencies referred to were the making of sales by Hammeken and the time of his death. The estate vested in Hammeken was a contingent one; it depended for its extent and limitations upon his opportunities and discretion. His duties were defined and certain, except as limited by the discretion reserved in making sales, but his interest in the trust property was contingent and uncertain.

Even if it be conceded that the trust is of the charcter contended for by the appellants, still we think that the statute of limitations would run against their demand. While there was no formal renunciation of the trust by Hammeken and actual notice thereof to the Laguerennes, yet the acts of Hammeken were equivalent to a repudiation of the trust, and the Laguerennes morally knew that he had abdicated the functions of his office and was converting the trust property to his own use. If appellants or their ancestors ever had a valid claim against Hammeken arising out of the transactions concerning the lands in question, they have, by their own inexcusable neglect, permitted the bar of the statute to accrue against it, and can not now be heard to complain. Nearly sixty years elapsed between the inception of their alleged right and the assertion of it in court. They have waited too long, and their claim is forever barred.

To the suit of appellants to recover the unsold portions of said surveys, the appellees pleaded the ten years statute of limitations provided by article 3209, Revised Statutes, the contention being that the suit of

appellants was in effect a suit for the specific performance of an executory contract for the sale of lands. The appellants insist that the instrument evidences an absolute sale of the unsold portions of said surveys which might be on hand at Hammeken's death, and that they can maintain their action of trespass to try title. The instrument does not purport to convey any lands, or to bind Hammeken at any future time to make conveyance. It binds Hammeken's executors, administrators and assigns, in case any of the lands should remain unsold at his death, to have the same surveyed, and to make conveyances thereof to such person or persons as Mrs. Laguerenne, her husband, her heirs, or assigns might order. This language manifestly implies an administration upon Hammeken's estate; an ascertainment of the lands unsold, and a formal conveyance made in accordance with the probate laws, before the Laguerennes were entitled to the possession of such lands. This provision is material, since its application would operate as a protection to the estate. Appellants were entitled to have the contract performed according to its terms, but they can not be said to have been vested with the title to the lands remaining unsold at Hammeken's death. It was evidently the intention of the parties that all the lands should be disposed of in Hammeken's lifetime, since he was to receive two-thirds of the proceeds of all sales, and no interest was retained for his estate in the unsold lands. The clause in reference to the unsold lands was obviously inserted to protect the Laguerennes against loss in the event of Hammeken's unexpected death, and the provisions concerning the surveying of such lands and the making of conveyances were incorporated in the instrument to shield the estate of Hammeken against unfounded claims that might be asserted by the Laguerennes. Even if the representatives of the estate held the title to the land in trust for the Laguerennes, the fact would not prevent the instrument from being a contract to convey lands, and the statute of limitations would nevertheless apply. Chamberlain v. Boon, 74 Texas, 659; Boon v. Chamberlain, 82 Texas, 480.

We conclude that the trial court did not err in holding that the remedy of appellants was by suit for specific performance, and that such suit was barred under the statute. The nature of the trust established by the instrument and the facts surrounding its creation have become so obscured by the lapse of time and the death of the parties, and the beneficiaries in the trust have been silent for so long, that we are not authorized to declare a trust different from the one shown by the terms of the instrument. Standing by itself alone, the instrument is not a completed declaration of an express executed trust, in so far as it relates to the proceeds of sales, and is not sufficient to convey to the Laguerennes the title to the lands remaining unsold at Hammeken's death.

We find no error in the record, and the judgment is affirmed.

Affirmed.

Writ of error denied.

SHERMAN, SHREVEPORT & SOUTHERN RAILWAY COMPANY v. A. L. EAVES.

Decided February 9, 1901.

1.—Railroads—Negligence—Proximate Cause of Injury at Public Crossing.

Where a train approached a highway crossing under full headway, without giving any signal or warning, its approach being shut off from the view of parties on the highway by a barn and orchard, and plaintiff's wife, in a buggy, had approached near the crossing without seeing or hearing the train, and her horse becoming frightened at the sudden passage of the train so near him, she sprang to his head to hold him, and was knocked down by him, dragged and otherwise injured, the negligence of the trainmen in failing to blow the whistle or ring the bell was the proximate cause of the injury, and the facts did not show contributory negligence on the part of plaintiff's wife in failing to look or listen.

2.—Expert Evidence—Opinion—Hypothetical Question.

Where there is no conflict in the evidence of the facts upon which an expert witness is called to give an opinion, a question which asks him to state, assuming the testimony to be true, his opinion thereon as to the point at issue, is not objectionable as requiring him to pass upon the evidence; nor is it necessary, if there be no conflict in the evidence, that the qustions should be put in hypothetical form.

3.—Contributory Negligence and Proximate Cause—Charge—Qualification.

Where, in a personal injury case, the court had given several special charges, one relating to proximate cause and the others to contributory negligence, and to the last one appended the qualification that if the person injured "was guilty of any act of negligence, that is, if she did not act as a person of ordinary prudence would have done under the circumstances, and her negligence caused or contributed to the injury, then she would be guilty of contributory negligence, and plaintiff can not recover; but if she did act as a person of ordinary prudence would have acted, then in no event would her acts prevent the plaintiff [her husband] from recovering on any of the theories submitted in any of the special charges," this stated a correct principle of law, and was not rendered erroneous by the fact that under a strict construction it applied also to the clause relating to proximate cause, to which it had no application and manifestly was intended to have none.

Appeal from Hopkins. Tried below before Hon. Howard Templeton.

Craddock & Looney, for appellant.

Crosby & Dinsmore, for appellee.

RAINEY, CHIEF JUSTICE.—Appellee instituted this suit to recover of appellant damages for personal injuries to his wife alleged to have been caused by the negligent operation of a train.

Appellant answered by general denial, and especially that Mrs. Eaves was guilty of contributory negligence in driving too near the railroad track without stopping, looking or listening for the train, etc. Plaintiff recovered, and defendant prosecutes this appeal.

The evidence shows that on September 4, 1899, Mrs. Ophelia Eaves, wife of the appellee, in company with Mrs. B. Odam and the little boy of the latter, were traveling in a single-horse buggy, without a top to it, along the public road leading into Cumby, Hopkins County, from the

south, which road crosses the railroad within a few feet of the appellant's depot at Cumby. The railroad track at Cumby and for some distance on either side runs east and west, and the public road which appellee's wife and those accompanying her were traveling, runs north and south, crossing the railroad at right angles at the depot. Appellee's wife and those with her were coming from the south and going toward the business part of the town of Cumby, which is located north of the depot. The depot itself is north of the main track, and between the depot and the main track is a side track, the side track being within eight or ten feet of the main track, and the depot platform is quite near the side track.

The road which appellee's wife was traveling was a public highway, and the chief one leading into Cumby from the south; was used a great deal by the people of that town and the country people living south from it. A large portion of the residence portion of Cumby is south of the railway track. The train was approaching from east, and an ordinary wind was blowing from the south. Along the road for some 300 yards from the crossing, the railway track at the crossing could be seen by a person in the highway.

On the east of and near the public road was a barn and orchard which obstructed the view, and a train approaching from the east could not be seen in approaching from the south until reaching a point about twenty feet from the railroad track. Mrs. Eaves and companion were driving in an ordinary gait, and when they reached within about that distance they saw a train coming from the east under full headway and about thirty or forty feet from the crossing. Immediately the buggy was stopped, they jumped out, Mrs. Eaves ran to the horse, caught hold of the rein, the horse became frightened, wheeled around, knocked her down, ran over her, pulled the buggy over her, her feet catching in the lines, and dragged her some twenty-five or thirty steps. She was cut and bruised in various places about the body and limbs and injured internally about the stomach and bowels. She was a stout, healthy woman before the injury, and prior thereto she had no irregularities in her monthly sickness. She has suffered from prolapsus of the womb, and has been flooding at frequent periods since. She suffered in other ways, but we deem it sufficient to say that the evidence shows that she was injured in a way that authorized the amount of judgment recovered. The evidence warrants the conclusion that there was negligence on the part of the servants operating the train in failing to blow the whistle and ring the bell in approaching the crossing, and that such negligence was the proximate cause of the injury. It also warrants the conclusion that Mrs. Eaves was not guilty of contributory negligence in approaching the crossing.

On the trial Dr. Dial was asked as an expert whether or not he had heard the testimony offered in the case as to the cause of and the manner in which the injuries to the shoulder and womb were sustained, to which he replied in the affirmative. Thereupon he was asked by plaintiff, "As-

suming the testimony of the witnesses which he had heard to be true, to what did he attribute the injuries to Mrs. Eaves' shoulder and womb?" To which question defendant then and there objected, because calling for an opinion of a witness upon the evidence as detailed by the witnesses, and requiring him to pass upon the evidence in the case, which objection was by the court overruled, and the witness permitted to answer that, assuming the facts detailed by the witnesses to be true, he would attribute the injury to the shoulder and to the womb to the accident by the fright of the horse by the train. This action of the court is assigned as error.

In the case of Armendiaz v. Stillman, 67 Texas, 458, cited by appellant's counsel in support of their position, the evidence was conflicting as to the issue about which the expert was interrogated, and Justice Stayton, in passing upon the admissibility of the expert's opinion in such a case, says: "If such a witness bases his opinion on a state of facts which he has heard other witnesses testify to, the value of his opinion depends upon the actual existence of the facts on which he bases it; and whether the facts so existed must be determined by the court or jury, and not by the expert. In cases in which the evidence is conflicting on the facts on which the opinion of the expert is founded, he can not be permitted to determine what the facts actually were and to give an opinion upon his own conclusion upon such conflicting evidence; for it is the province of the court or jury trying the case to determine the existence or nonexistence of the facts on which the expert's opinion is based. The evidence conflicting, if the defendants desired the opinion of the expert upon the state of facts which the evidence offered by them, including the evidence of the expert in so far as he stated facts, tended to establish, then they should have sought his opinion upon the hypothetical case thus made. This they did not. They simply asked for and received an opinion based upon conflicting evidence, which necessarily required the witness to pass upon disputed facts." See also Rogers on Exp. Test., 63-66.

It is to be noticed that the rule announced by Justice Stayton is based upon the fact that the opinion of the expert witness was elicited upon testimony of witnesses as to a condition about which there was a conflict in the testimony as to the cause that produced the condition. In the case under consideration there is no conflict as to the facts. There is no conflict as to Mrs. Eaves' condition before and after the accident, or that she received injuries at the time and in the manner she stated in her testimony. The issue was whether or not her condition after the accident was attributable to the injuries she then received, and the question required the witness to assume that the facts stated in regard to the injury were true. There was no necessity of a hypothetical question being propounded, as in propounding such a question the evidence of the witnesses, in substance, would have been embraced therein, there being but one state of the evidence and no conflict of the evidence as to the facts relating to when and how she was injured and her condition afterward. Jones v. Railway, 45 N. W. Rep., 444; Dwinnell v. Abbott, 43 N. W. Rep., 496;

Lawson on Exp. Ev., 2 ed., 175; Gates v. Fleicher, 67 Wis., 504; Wright v. Hardy, 22 Wis., 334.

The appellant requested the giving of six special charges, which the court gave. Five of these related to contributory negligence, and presented various theories deducible from the evidence as to the conduct and acts of Mrs. Eaves at the time of the accident. The other, which was the second special requested charge, was in effect that Mrs. Eaves could not recover unless the negligence of defendant was the proximate cause of the injury. To the sixth special charge the court appended this qualification: "If Mrs. Eaves was guilty of any act of negligence, that is, if she did not act as a person of ordinary prudence would have done under the circumstances, and her negligence caused or contributed to her injury, then she would be guilty of contributory negligence, and the plaintiff can not recover; but if she did act as a person of ordinary prudence would have acted under the circumstances, then in no event would her acts prevent the plaintiff from recovering on any of the theories submitted in any of the special charges."

The qualification expressed a correct principle of law, and as five of said charges were somewhat similar in their character and in some respects reiterated the same matter, it was not error as to these. While, by a strict construction, it might refer to the second special charge relating to "proximate cause," yet it has no application and was evidently not so intended by the learned trial judge.

The acts of Mrs. Eaves could in no event have affected the question of "proximate cause," and as her acts could relate only to the question of contributory negligence, it is not probable that the jury considered it in any other relation, and was not misled thereby.

We find no error requiring a reversal of the judgment, and it is affirmed.

ADDITIONAL FINDINGS.

At the request of the appellant, we find, in addition to the facts heretofore found, the following: The railroad track going into Cumby from the east is up grade for about one mile, the depot being about the crest. The train that frightened Mrs. Eaves' horse was the local freight, and in ascending the grade made considerable noise by the exhaust of the engine, which could be heard some distance. It was heard by some of the defendant's witnesses one-half mile away.

Affirmed.

Writ of error refused.

MILLER-STONE MACHINERY COMPANY ET AL. v. THOMAS BALFOUR.

Decided February 15, 1901.

1.—Rescission of Contract—Sale of Mill Machinery with Warranty—Damages—Demurrer.

In an action to rescind, in the alternative, a contract by which plaintiff purchased certain mill machinery under a warranty that it would work well, a demurrer by the defendant to certain items of damage charged in the petition as the cost of drayage and of placing the machinery in position was properly overruled, since there might have been shown a state of facts that would have authorized a recovery of those items.

2.—Same—Damages Where Fraud Not Shown and Rescission Denied.

Where, however, on the trial a rescission of the contract was denied, no fraud on defendant's part being shown, and plaintiff recovered the difference between the cost price of the machinery and its actual value as affected by certain defects, it was error to further allow plaintiff the items of drayage and cost of placing the machinery in position, since these items must have been incurred by the purchaser in any event. See facts under which a rescission was properly denied.

3.—Practice—Trial Upon Special Issues.

Where the jury, upon special issues submitted, found the value of the property in a certain sum, and the court, in rendering judgment, found it at a different sum, there was error in the judgment.

Appeal from Grayson. Tried below before Hon. Don A. Bliss.

E. F. Brown, C. R. Crenshaw, and *Capps & Canty,* for appellants.

A. L. Beaty, for appellee.

BOOKHOUT, ASSOCIATE JUSTICE.—This suit was instituted by Thos. Balfour against the Miller-Stone Machinery Company, William Capps, and G. E. White for the rescission of a contract and for damages sustained by a breach thereof.

Plaintiff alleges that on the 16th day of July, 1897, plaintiff and defendant Miller-Stone Machinery Company, entered into a contract whereby plaintiff purchased and defendant agreed to deliver to him in Sherman, Texas, certain machinery (a gin outfit) by August 20, 1897, and represented and warranted that the same would, with proper management, perform well, and that said machinery was of superior quality and manufacture, and would gin from forty to fifty bales of cotton per day, and further represented that said machinery, except the engine and boiler, were manufactured in Birmingham, Ala., and would be shipped from said point, and would be of the Smith manufacture. The consideration was the payment of freight, not over 70 cents per hundred, and $2875, for which he executed and delivered to said defendant his promissory notes set out in defendant's answer. And at the time of the execution and deliery of the notes plaintiff executed a chattel mortgage on said machinery to secure the payment thereof. Plaintiff alleges that

with proper management said machinery failed to perform well and to do the work as warranted. The plaintiff properly notified defendant of the defects, stating as far as he was able the particular defects, and wherein it failed to conform with the warranty, and furnished all the aid and assistance in his power to remedy the defects, and defendant sent its practical engineer to Sherman several times, and made certain changes in the arrangement of said machinery, but failed to make it conform to its warranty, and wholly failed to take said property back and substitute other machinery, and alleged specifically certain defects in the machinery, and on or about October 9, 1897, he declined to pay his first note due, and tendered back the machinery and filed suit. That the machinery contracted to be delivered was worth $4000, and that delivered not more than $1000.

As special damages the following items are alleged: Drayage, $45; cost of placing machinery in the building, arranging and fitting same up according to instructions of defendant, $250.

Plaintiff, as cause of action against Smith Sons Gin and Machinery Co., William Capps, and G. E. White, alleges that as soon as this suit was filed, defendant, Miller-Stone Machinery Company, transferred the note first due to said Smith Sons Gin and Machinery Company, fraudulently and for the purpose of defeating the jurisdiction of this court; that G. E. White is trustee under said deeds of trust, and William Capps substitute trustee and attorney for defendants, Miller-Stone Machinery Company, and Smith Sons Gin and Machinery Company, instituted suit in the County Court of Tarrant County on said note for said Smith Sons Gin and Machinery Company, and at same time advertised the machinery for sale by substitute trustee to pay all notes, and prayed for writ of injunction.

Defendants answered by demurrer, exceptions and general denial, special answer setting up the notes and chattel mortgage and praying for foreclosure and judgment on the notes, also facts for writ of sequestration, and on 2d day of September, 1898, sequestered the machinery and took it into possession of Miller-Stone Machinery Company. The notes, eight in number from date August 4, 1897, aggregated $2875, bearing 10 per cent interest from August 15, 1897, and 10 per cent attorney's fees if placed in the hands of an attorney for collection or sued upon, and stipulated that failure to pay any one matured all.

Defendants also allege that the machinery was in all particulars what it was represented to be, and defendant complied with its contract. And then, under the warranty, written notice must be given, wherein it fails to comply with the warranty and a reasonable time given to remedy the defect; then the purchaser is to render all necessary aid, and if it can not be made to work, and the fault is in the machinery (which fact is to be determined by the practical engineer of defendant), in such case it is to be taken back and new machinery substituted. Defendant denied that there was any defect in the machinery, and charged that if the ma-

chinery did not perform well, it was the result of bad management on the part of plaintiff and his employes.

There was judgment for plaintiff for $949.13 and costs, and the injunction against the collection of the notes was perpetuated.

Conclusions of Law.—Appellants complain of the action of the court in overruling their special exception to that part of the petition claiming damages for freight and for drayage and damages for putting the machinery in place in the building. The objection made to these items of damage is that they are remote and speculative. There was no error in overruling this exception. The petition sought a rescission of the contract, and there might have been shown a state of facts that would have authorized a recovery for these items.

The court did not err in overruling the exception to the allegations in the petition in reference to the notice given by plaintiff to the machinery company. The petition alleged that the machinery company acted upon the notice as given, and sent a practical engineer to Sherman to make the necessary changes in the machinery. The case was tried upon special issues. The jury found, among other things, that the plaintiff was unable to make the machinery perform well, upon starting it; whereupon he notified defendant machinery company of this fact; that defendant sent his engineer, who examined it and determined that there were defects in the fan and seed flue. These defects could be repaired at a cost of $50 for the seed flue and $80 for the fan. That the defects could have been remedied in three days, at a loss to plaintiff of $30. That entire pneumatic suction and elevator system, including the fan, could have been put in in about two weeks, at a cost $375.

It was shown in evidence that about the latter part of September there were changes made in the fan and other parts of the elevator system. The jury found that on October 1, 1897, up to the time the machinery was shut down, it performed *tolerably* well. The jury further found that the machinery had it come up to the terms of the contract, would have been worth $3257. That the machinery delivered was worth $2000. That the drayage amounted to $45, and that the cost of placing the machinery was $250.

The court found that the value of the machinery on September 2, 1898, when sequestrated by the company, was $2500. The court declined to rescind the contract, but gave judgment for plaintiff for the difference between the value of the machinery, had it complied with the contract, and the value of the machinery delivered, to wit, $1257, and to this added the cost of putting it in place and of drayage, making $1552, and deducted this sum from the contract price, $2875, and on this difference, $1323, allowed interest at 10 per cent per annum up to September 2, 1898, and added 10 per cent as attorney's fees, making $1612.96, and deducted this amount from the value of the machinery at the time it was sequestered and converted by the company, as found by the court, to wit,

$2500, and for this difference, $887.04, with interest thereon at 6 per cent per annum, gave judgment for plaintiff.

Appellee does not agree with the theory upon which the trial court rendered judgment, but insists that he is entitled to have the contract rescinded, and a judgment for such damages as he sustained in the way of expenditures made on the faith of the contract, and if this is not so, then the judgment should be affirmed.

He has cross-assigned error, in which he presents the above contention, and further insists that upon rescission the court should allow appellee the amounts expended for freight, drayage, placing machinery and the amount expended by him for the construction of a building for the machinery, less the amount the building enhanced the value of the realty.

The question raised by the cross-assignments, logically, is the first in order and will be first disposed of. Did the court err in refusing to rescind the contract?

The machinery was sold upon the following warranty: "Miller-Stone Machinery Company warrants that the machinery above described will, with proper management, perform well. Upon starting it, if the purchasers are unable to make it operate, written notice stating wherein it fails to conform with the warranty is to be given by the purchasers, and a reasonable time allowed to get it and remedy the defects, if any exist. If they are not able to make it operate well (the purchaser rendering necessary and friendly assistance), and the fault is in the machinery, and this is to be determined by our practical engineer, it is to be taken back and another substituted in its stead. But if the purchasers fail to make it perform through improper management or want of skill, the purchasers are to pay all necessary expenses incurred. And the purchasers agree to have a skilled engineer to run it."

The machinery upon being started did not perform well. The purchaser notified the machinery company, and the company sent its engineer to remedy its defects. He determined the defects were in the fan and seed flue, which could have been remedied by the substitution of a new fan and seed flue at an expense of $160.

On Sptember 28, 1897, the plaintiff wrote a letter to the machinery company at Fort Worth, in which he complained of the fan, and called upon the company to put in a new fan at once. A new fan was furnished. No demand was made by the plaintiff on the company to substitute other machinery for that on hand. The jury found that on and after October 1st the machinery performed tolerably well. This suit to rescind was filed October 9th, yet the plaintiff continued to operate the machinery until October 18th. It was not shown that the machinery company was guilty of any fraud in the transaction. We conclude that the plaintiff, under the facts shown, was not entitled to a rescission of the contract. Sedg. on Dam., 8 ed., sec. 759; Wright v. Davenport, 44 Texas, 184; Stark v. Alford, 49 Texas, 275.

Appellant by proper assignments challenges the findings of the court

as to the value of the machinery when sequestrated, and the finding of the jury as to its value when delivered, and the correctness of the judgment rendered.

The court found the value of the machinery on September, 1898, to be $2500. The jury found its value when delivered, in 1897, to be $2000. There is no evidence that it had increased in value from the time it was closed down in October, 1897, and the time it was sequestrated. Common experience, in the absence of testimony, would lead us to believe that machinery of this character would not increase in value by lapse of time. There is no evidence that care was used in the keeping of the machinery.

Counsel for appellee explains that it may be that machinery of this character increased in value between the time it was delivered and the time it was sequestrated. If such be the case it would have been easy to make proof of that fact. It is difficult to reconcile the finding of the jury as to the cost of remedying the defects in the machinery, and their finding that the difference in the value of the machinery contracted for, and that delivered, was $1257. We think it clear that the value placed upon the machinery by the jury was too low, or that found by the court was too large. In either event there is error in the judgment. By reason of the difference in the value of the machinery as found by the court and that found by the jury, the judgment against the machinery company is increased $500.

The next question is, did the court err in allowing a recovery for drayage and putting the machinery in place? The general rule for the measure of damages upon the breach of a contract for the sale of personal property is the difference in value of the machinery contracted for and that actually delivered. Wright v. Davenport and Stark v. Alford, supra; Sedg. on Dam., 8 ed., sec. 762.

Does the record present a state of facts that would take this case out of the general rule? The rescission being refused, the purchaser is entitled to the property, and may recoup against the purchase price his damages. The court allowed a recovery by the purchaser for the difference between the value of the machinery contracted for, and the value of the machinery delivered; also the cost of drayage, $45, and the cost of putting the machinery in place, $250. The last two items must have been incurred by the purchaser in any event. They were not incurred by reason of any defect in the machinery.

There being no fraud proven, we conclude under the facts found by the jury, it was error to allow plaintiff to recover for drayage and for putting the machinery in place.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

J. T. JUDD v. STATE OF TEXAS

Decided February 23, 1901.

1.—Parol Evidence—Written Instrument Lost—Boundaries.

Upon proof of the loss of a petition for the incorporation of a town, parol evidence is admissible to prove, as part of its contents, the boundaries therein shown.

2.—Incorporation of Towns—Excessive Territory—Validation—Commissioners Court.

Where the incorporation of a town was invalid because 75 to 80 per cent of the territory included was agricultural and pastoral land, such invalidity was not cured by article 616c, Revised Statutes, since that article has no application to incorporations in violation of law, but only to such as were defective because of a failure to comply with all the requirements of the law; nor could such invalidity be cured by an order of the commissioners court changing and making smaller the boundaries, since that court had no jurisdiction in the matter.

3.—Same—Act of 1893—Constitutional Law.

Nor was such invalidity cured by the Act of 1893, page 175, relating to the incorporation of towns for school purposes, since that act has no application to general municipal corporations, and if intended to have such application, it is obnoxious to the provision of the Constitution (section 35, article 3) prohibiting the inclusion of more than one subject in the same bill.

4.—Same—Revised Statutes—Codification Not a Re-enactment.

The invalidity of an act of the Legislature resulting from its violation of the provision of the Constitution prohibiting more than one subject in the same bill is not obviated by the subsequent inclusion of the act, with a division of it into two articles, in the codification of the present Revised Statutes, and upon the ground that the adoption of the Revised Statutes was a re-enactment of the law, since the Revised Statutes, by virtue of express provision therein, are to be construed as continuations of the existing law, and not as new enactments of the same. Final Title, sec. 19.

Appeal from Grayson. Tried below before Hon. Rice Maxey.

Wolfe, Hare & Semple, for appellant.

L. B. Eppstein and *C. T. Freeman,* for appellee.

RAINEY, CHIEF JUSTICE.—This is a quo warranto proceeding to oust the appellant as mayor of the towns of Pottsboro, for the alleged reason that said town was never legally incorporated, as the limits sought to be incorporated include agricultural and pastoral land. Judgment below ousted appellant, from which this appeal is prosecuted.

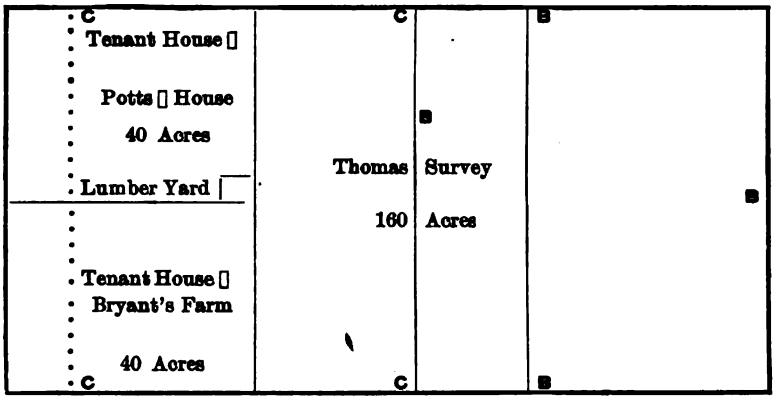
The sketch on page 419 will illustrate more clearly the facts hereinafter stated, about which there is no controversy.

In 1885, upon a petition signed by the requisite number of citizens, the county judge of Grayson ordered an election to determine whether or not the town of Pottsboro should be incorporated so as to include the boundaries to all the territory embraced in the outer lines of said sketch, which will be referred to hereafter as territory "A." The election was ordered and held within said town, and resulted in favor of incorporating. The judge then entered an order in the minutes of the commissioners

Court, purporting to incorporate the territory indicated on the sketch by the lines marked "B," and which will hereafter be designated as territory "B."

After this action of the county judge was entered on the minutes of the Commissioners Court, the town of Pottsboro exercised all the functions of a town or village, and was recognized as such up to November 18, 1893. On that date a petition was filed in the Commissioners Court of Grayson County, Texas, asking that the said corporation lines of the town of Pottsboro be corrected and changed so that the boundaries of said corporation should embrace only the territory marked on the sketch at the corners by the letter "C," which will be hereafter referred to as territory "C."

The Commissioners Court acted on this petition on the same date, making an order that the field notes read so as to describe territory "C." After this action on the part of the Commissioners Court, the town of



Pottsboro exercised jurisdiction only over territory "C," and over no other part of the various territories herein described.

The territory herein referred to as territory "A" included on the east a 160-acre tract of land, which was fenced, which then was and at all time since has been uninhabited, and which at all times herein mentioned was used as a cow pasture, and was known as the D. E. Bryant pasture. Territory "A" also included a second 160-acre tract, known as the W. M. Thompson survey, the south 70 acres of which was a fenced cow pasture, was and is wholly uninhabited, but since 1885, 30 acres have been put into cultivation. Of the other 90 acres of the W. M. Thompson survey, the northern portion was not inhabited, and 13 acres has since been put into cultivation. Territory "A" further included two 40-acre farms, which were known respectively as the Bryant farm and the Potts farm. On the Bryant farm lived a tenant and his family who were engaged in cultivating this tract of land, and other land west of it. On the Potts farm Mr. Potts lived. There also resided on this tract a tenant who was employed in cultivating this and other land west of it.

Territory "B" includes the 160-acre tract known as the D. E. Bryant pasture, and the east 66 acres of the W. M. Thompson survey. This, of course, includes part of the 70-acre pasture, and part of the 90-acre tract, on which was situated the collection of houses known as the town of Pottsboro. Judge Bryant and Mr. Potts (whose wives were the owners of the agricultural and pastoral land herein described) both opposed the incorporation of the town of Pottsboro and worked against it. Mr. Potts and his wife resided on the 40 acres of land adjoining the town of Pottsboro. Judge Bryant and his wife resided in Sherman, Texas. In 1885 the town of Pottsboro contained 204 inhabitants, and at the time of the trial of this case about 400. In April, 1900, there was an election held in the town of Pottsboro for mayor, and the appellant was elected to fill said position. If said corporation is held to be valid, then no question is raised as to his right to hold and exercise the functions of said office.

The original petition presented to the county judge in 1885 is lost, and parol evidence of its contents was admitted over the objections of appellee. The contention of appellee is, that the order of the county judge, entered on the minutes of the Commissioners Court, which shows the boundaries to be as shown on the map as territory "B," is conclusive in the absence of the original petition, and that the contents of said petition can not be shown by parol evidence. Our Supreme Court has held that the order of the county judge was not conclusive as to boundaries, but that the boundaries set forth in the petition to be incorporated controlled. Ewing v. State, 81 Texas, 172; Furrh v. State, 6 Texas Civ. App., 221. We see no reason why the admission of proof of the contents of the petition by parol, it being lost, should be an exception to the general rule which permits the contents of lost instruments to be established by parol. There was no error in this action of the court.

It will be noted from the evidence that about 75 or 80 per cent of the territory as originally attempted to be incorporated was agricultural and pastoral land adjacent to said town. This land can not fairly be termed a part of the town as it existed or now exists, and the inclusion of such a quantity of agricultural and pastoral land was clearly illegal, and rendered the attempt to incorporate invalid. Ewing v. State, supra; Matthews v. State, 82 Texas, 577; McCloskey v. State, 4 Texas Civ. App., 322.

It is insisted, however, that if said action was invalid, it was validated by the provisions of article 616c, Revised Statutes, which validates corporations where, in attempting to incorporate, there was a failure "to comply with all the requirements" prescribed by the law. We are of the opinion that this case does not come within the provision of that article. The terms of said article apply to attempts at incorporation where the law was attempted to be followed, but in some particulars it was not done, and where, if the forms of the law had not been omitted, the incorporation would have been valid. In this case, however, none of the forms of the law were omitted, but an attempt was made to in-

corporate, in addition to the town, territory consisting of agricultural and pastoral land when there was no law authorizing the incorporation of such territory. The validating act applies to those attempts where a legal incorporation was sought to be established, but does not apply to those where it was sought to incorporate in violation of the law. Nor does the action of the Commissioners Court in 1893, where, on the application of certain citizens, it entered an order changing the limits of said town, come within the provisions of said article, 616c. The Commissioners Court had no jurisdiction in the matter, and such action was absolutely void and of no effect, and can not be considered as an attempt to comply with the law authorizing incorporating for municipal purposes.

It is also insisted that said incorporation was validated by the act of the Legislature in 1893 (page 175). The caption of said act related only to the incorporation of territory for school purposes, and the language used, if construed independent of the caption, is broad enough to include such an incorporation as this.

On the same day said act was passed the Legislature passed another act (Session Acts 1893, page 176) making provisions for cities and towns to eliminate the agricultural and pastoral land from their boundaries where such were embraced therein, and validating such corporations in the event such eliminations were thereafter made. It is therefore hard to conceive that the Legislature intended to validate the attempt to incorporate towns and villages that had included such land, and in some instances embraced an area of thirty-six square miles, when it, on the same day, passed an act validating the incorporations of cities and towns upon condition that such land should be eliminated from their territory.

If it be conceded, however, that the intention of the Legislature was that it should apply to corporations for general municipal purposes also, then we are of the opinion that it is obnoxious to section 35, article 3, of the Constitution of this State, which prohibits the including of more than one subject in the same bill.

The appellant insists that said act is not subject to such constitutional objection, but if so, that such defect was cured by the validating clause in said act being placed in the Revised Statutes as a separate article, numbered 616b, and that the adoption of the Revised Statutes was a re-enactment, and must be construed independently of any former action of the Legislature. Section 19 of the Final Title of the Revised Statutes reads: "That the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this State in force at the time when the Revised Statutes shall go into effect, or of the common law in force in this State at said time, shall be construed as continuations thereof, and not as new enactments of the same." This section declares that the Revised Statutes are not a re-enactment of the laws, but merely a continuation thereof, which in our opinion requires a construction of

the act as originally enacted. The act providing for a codification of the laws did not authorize the codifiers to change or alter them, but it was intended that the laws should be compiled and embodied in a convenient form. The body of said validating Act of 1893 is copied in the Revised Statutes as originally passed, except it is divided into two articles, one being 616b and the other 616c.

We are therefore of the opinion that the attempted incorporation of the town of Pottsboro is invalid, and the judgment of the District Court is affirmed.

Affirmed.

Writ of error refused.

FIRST DISTRICT, 1901.

T. B. SALMONS ET AL. v. MARY THOMAS.

Decided March 12, 1901.

1.—Homestead—Abandonment.

That the surviving wife allows her grown daughters to live with her and to share in the general income of the homestead property, and that the daughters paid taxes on the respective portions therof allotted to them in remainder, does not show that the wife had, as against the claims of the daughters, abandoned her homestead rights in the property.

2.—Same—Same—Adult Unmarried Daughter.

An adult unmarried daughter, though a constituent member of the family, has no right in the homestead property, nor in the rents and income thereof, as against the use of the property as a homestead by the surviving parent. Ashe v. Youngst, 65 Texas, 631, followed.

3.—Same—Guardian—Receipt as Estoppel.

Where a surviving wife was guardian of her minor daughter, and the latter, upon her own marriage, gave to the former a receipt in full for her interest in the estate which recited that the guardian "has turned over to me all the real estate belonging to me," this did not raise the issue of estoppel against the guardian to assert thereafter her homestead right in such real estate.

4.—Same—Income of Homestead—Immaterial Error.

Where, in a contest between children and their mother as to homestead property, the verdict of the jury found in favor of the mother's homestead rights, it was immaterial that the verdict did not specifically dispose of certain sums of money the income of the property, since it necessarily followed from the verdict that the mother was entitled to such money.

5.—Same—Misjoinder.

Error in refusing to sustain objections to plaintiff's petition on the grounds of misjoinder, in that it combined a demand for judgment on certain money claims with a suit to recover possession of the homestead, was harmless where no recovery was had on the money demands.

Appeal from Dallas. Tried below before Hon. J. J. Eckford.

Crawford & Crawford, J. C. Kearby, and *Moroney & Love,* for appellants.

Robt. B. Seay, for appellee.

GILL, ASSOCIATE JUSTICE.—This suit was brought by Mary E. Thomas, the appellee, against Ellen Thomas and Mollie Thomas Salmons, two of her children by her deceased husband, A. A. Thomas. T. B. Salmons, the husband of Mary Thomas Salmons, was also made a party defendant. The purpose of the suit was to establish the right of appellee to the use of 200 acres of lands as her homestead during her lifetime, and to recover certain money demands against the defendants. She also prayed for injunction restraining defendants from interfering with her in the use of the homestead. The defendants Ellen Thomas and Mollie Salmons alleged that the homestead tract had been partitioned, that certain parts of it had been allotted to each of them, and that as to such parts the plaintiff had, by abandonment and for other reasons not necessary to be stated in this connection, lost her right to assert the homestead claim as against their rights to the portions thus set apart and turned over to them. Each of them also claimed, as against the plaintiff, certain money demands which, in view of the disposition of this appeal, need not be stated. They also prayed for injunctions protecting their asserted rights from interference on the part of plaintiff. Pending the litigation and prior to the trial, the court granted temporary writs of injunction in behalf of plaintiff as prayed for, and the entire 200-acre tract was placed in the hands of a receiver, with power to rent it out to the best advantage and account to the court for the proceeds.

A trial by jury resulted in a verdict and judgment establishing the plaintiff's right to the use of the 200 acres (less 37 acres) during her lifetime, or so long as she chose to use it, and enjoining the defendants from interfering with her in the enjoyment of such right. Mrs. Mollie Salmons was adjudged to be the owner of the 37 acres before mentioned, with right to its use free from the homestead claim, and plaintiff was enjoined from interfering with her and her husband in its use. None of the parties recovered anything on their money demands.

After verdict the receiver filed a supplemental report stating the amount of rents collected and the part of the land from which they were received. This report showed that $87.25 had been collected as rents from the 37 acres above mentioned, and the court awarded that sum to Mrs. Salmons. The remaining money in the hands of the receiver was awarded to the plaintiff. A rent note for $113, reported by the receiver as on hand, was not disposed of by the decree of the court, but the receiver, upon compliance with the decree, was discharged.

Ellen Thomas recovered nothing, and she and Salmons and wife have appealed.

A. A. Thomas, deceased, was the husband of Mary Thomas and the father by her of the two children above named as appellants and three

other children who are not parties to this suit. At his death the 200 acres of land in question was his separate property, and was the homestead of himself and wife, and the unmarried children lived with them. He was seized of other lands also, and after his death his property, including the homestead, was partitioned among the children, as follows: The homestead was divided into parts of equal value, and each child was allotted one portion thereof, but the right of the surviving widow to the use of it all as a homestead for the benefit of herself and unmarried daughters was undisturbed.

The lands not included in the homestead were also partitioned equally between the children, so that each child received absolutely an equal share in the lands last named.

At the date of her father's death Mollie Thomas (now Salmons) was a minor and unmarried, and thereafter her mother qualified as guardian of her estate. In the partition above mentioned there was allotted to Mollie 48.35 acres of the homestead, and a 98-acre tract not included in the homestead. In 1887 the mother, as guardian, applied to the probate court in which the guardianship was pending for an order authorizing the exchange of the 98-acre tract belonging to Mollie for 37 acres included in the homestead, and which had in the original partition been allotted to the daughter Sarah, who had married. The reason for the exchange, as stated in the application, was that the 37 acres were valuable and producing an income, whereas the 98-acre tract was wild land, bringing in no revenue. The court granted the order, and the exchange was made. Mollie thus became the owner of two tracts within the homestead, viz., 48.35 acres and 37 acres.

On January 4, 1899, the accounts of the guardian were adjusted, and she was found to be indebted to the ward in the sum of $335, and the guardianship was closed. On the same day Mollie Thomas executed and delivered to her mother the following receipt: "The State of Texas, County of Dallas.—Received, Dallas, Texas, January 4, 1889, of Mary E. Thomas, as my guardian, the sum of three hundred and thirty-five dollars in full settlement of all the money and personal property due in any manner from my guardian, and in addition to said sum of money my said guardian has turned over to me all the real estate belonging to me, and this is a full receipt and acquittance for any and all demands against my said guardian. Mollie A. Thomas." No money was in fact paid upon the delivery of this receipt, and Mollie Salmons testified that her mother was thereby released from the payment of the money on the understanding that she would turn over to the ward the two tracts of land included in the homestead, and that this was in fact done.

Ellen Thomas never married, but remained on the old homestead with her mother until the occurrences which finally resulted in this litigation. She contends, first, thather mother had abandoned the portion allotted to her (Ellen) in the hometsead, and that she (Ellen) was therefore entitled to the use, possession, and control of that part; second, that she (Ellen) had adversely held and used it for such length of time as to

bar her mother's right; and, third, that being an unmarried daughter and a constituent member of the family at the date of her father's death, and having remained so, she is entitled to reside with her mother upon the homestead and to share generally in its use and the proceeds of its rental.

The evidence is sufficient to support the finding that the mother had not abandoned her right to the use of the entire homestead during her life. She allowed the daughters to continue to live with her, and permitted her widowed daughter, Mrs. Smith, to return to the old home after her husband's death and share in the general fund. It is true she permitted each to pay taxes on the shares allotted to them in the partition, and to receive the rents when such portion of the land was rented, but there is testimony sufficient to sustain the conclusion that the proceeds of the various parts of the farm, even when thus collected by the owners of the several parts, were used in common so long as they lived together in peace, and that the mother, though she turned over the entire management of the entire premises to her daughters Ellen and Mollie up to the time of Mollie's marriage, did not thereby intend to abandon her rights in the homestead, and that her acts did not constitute an abandonment. In the partition such right was expressly reserved.

There is no evidence to sustain the plea of limitation.

The right asserted by Ellen to share with her mother the use of her homestead by reason of the fact that she was, at the death of her father and continued to so remain, a constituent of the family, is not without force. But whatever may be the rule as between minor children and the surviving parent, it is fairly well settled that an adult unmarried daughter, though a constituent of the family, has no rights in the homestead property as against its use as such by the surviving parent. Ashe v. Youngst, 65 Texas, 631, and authorities cited. In the case cited it is said, among other things: "If the mother survived, the rule has been to place the homestead in her possession and under her control, the law presuming that this gave all necessary protection to the minor children." So, upon this ground alone, the judgment against Ellen upon this proposition can be upheld. But the jury found against her on the ground that she (Ellen) had abandoned such homestead rights as she had, and we think the evidence sufficient to sustain this finding.

We regard the present case as an illustration of the wisdom of the rule as announced by Judge Stayton in Ashe v. Youngst, supra. The widow and daughters lived upon the homestead in peace and amity from the death of the father until the marriage of Mollie to Salmons, enjoying its fruits in common. Up to that time the purpose of the law had been accomplished, in that the natural affection of the mother for the children had proved their ample protection. Opposition to the marriage of Mollie and other incidents connected therewith resulted in differences and contention against which no law can provide, and for the unfortunate consequences of which there is no remedy. Ordinarily persons holding and using property in common can, when differences arise which

make such use impossible, secure a partition and enjoy their shares in severalty. But as to a homestead, partition can not be had as against the surviving wife. To permit it would be to defeat one of the prime purposes of the exemption. While the mother and children remained together the homestead was ample for their joint support. To compel the mother to share the proceeds with the daughter for her maintenance elsewhere would in some cases render the amount insufficient for the support and maintenance of either. In case of a residence homestead in a city bringing in no revenue such a course would be impossible. It follows, we think, that in such a contest the rights of the children, if any they have to the homestead, must give way to the paramount right of the mother. It follows also from what had been said that it was properly adjudged that Ellen take nothing on her prayer for a money judgment, since the right to it was based on her alleged rights in the homestead.

The 37 acres of the homestead which, on application of the mother as guardian, was conveyed to Mollie in exchange for outside lands belonging to her, was adjudged to Mollie, with right of immediate possession and use. As to that part of the decree, the appellee has undertaken to cross-assign error, but it is not presented in such form as to require our notice.

Appellant Mollie Salmons assails the verdict and judgment for adjudging to appellee a homestead right to the 48 acres of the homestead originally allotted to her, subject to her mother's rights. She contends that this was error; first, because her mother had abandoned such homestead right as she had thereto, and second, that the proof shows that the receipt hereinbefore set out recited its surrender and delivery, and that appellee can not question its effect.

It has already been shown that the evidence sustains the finding of the jury that the appellee had not abandoned any of her homestead rights. The receipt alone is insufficient to sustain the contention of appellant Mollie Salmons, and as to the facts attending its execution and the purpose for which it was executed, the evidence is conflicting. We do not feel authorized to disturb the conclusion which the jury must have reached upon that issue. The complaint that the trial court erred in failing to submit to the jury the issue of estoppel growing out of the receipt and the facts attending its execution is without merit. It was a question of contract, of what was agreed to be done, and the issue of estoppel is not presented.

This litigation has been pending for years, and during its progress the trial court made many orders not necessary to be here set out. The 37 acres of land adjudged to Mrs. Salmons was in the possession of her and her husband from the institution of this suit until it was turned over to the receiver in 1899. The receiver's report in the statement of facts, and which was adduced on the trial, did not disclose whether any of the money reported on hand was the proceeds of the rental of the 37 acres adjudged to Mrs. Salmons. He merely reported the gross sum on hand, without indicating the special sources from whence it came. No objection was made to the report at the time of its introduction, and it

was supplemented by no proof which indicated the extent to which Mrs. Salmons was entitled to share in the funds. She had asserted an interest therein, and should have adduced some proof from which the jury might determine the extent of her interest. This she did not do, and the jury were unable to adjudge her any. The issue was not submitted by the court, nor was any special charge asked on the question. The extent of the rights of appellee and Mrs. Salmons in and to that fund was not in fact adjudicated on the trial, but the verdict of the jury established their respective interests in the land. Prior to the entry of the final judgment the trial court heard the receiver's final report and prayer for discharge. This report indicated that $89.25 was all the revenue he had received from the 37-acre tract adjudged to Mrs. Salmons, and that all the other funds on hand were derived from the lands adjudged to Mrs. Thomas. The truth and correctness of the report was not and is not questioned. But the trial judge, after hearing the report, adjudged the funds to appellee and to Mrs. Salmons, in accord with their rights as indicated by the verdict as to the land, and in accord with the receiver's report. Mrs. Salmons thus received the $89.25, the entire proceeds of the rent of the 37 acres, and if the verdict is right as to her interest in the homestead tract, she does not contend that she is entitled to a greater sum than that indicated by the receiver's report. The technical objection is made that the entire judgment should be reversed because the verdict of the jury did not dispose of the funds in the hands of the receiver. It was a matter not absolutely necessary to be adjudicated on the trial. It was not in fact adjudicated, and we think the court did not err when, in passing on the receiver's final report and discharge, he adjudged the funds to be paid out in accordance with the rights of the parties as fixed by the verdict.

The further objection is made that the judgment of the court did not dispose of the $113 rent note which the receiver reported as on hand. Of this appellants can not complain, for if the verdict of the jury is otherwise correct, the note inevitably belongs to appellee. It is also urged that the court erred in refusing to sustain appellants' objections to the part of the petition asking for judgment upon certain money demands, on the ground that to combine a suit for those demands with a suit to recover possession of the homestead was a misjoinder of causes of action. It is unnecessary to state the nature of these claims. All but one are averred to have grown out of the alleged invasion of the homestead rights, and we are inclined to the opinion that appellants' objection was not well taken; but if this were not true, the fact remains that no recovery was had thereon and no harm is shown.

We have not disposed of the assignments of error in their order or in detail, but have endeavored in the foregoing opinion to dispose of the questions raised. We are of opinion that no harmful error has been made to appear, and that the evidence is sufficient to support every conclusion which the jury must have reached in arriving at their verdict.

Affirmed.

HARTFORD FIRE INSURANCE COMPANY v. P. C. POST ET AL.

Decided March 15, 1901.

1.—Fire Insurance—Misjoinder of Actions.

Where plaintiff, whose lumber was insured with two different companies by separate policies issued at different times, but covering the same property, brought a single action against both companies to recover for its loss, there was a misjoinder of causes of action, as there was no privity between the defendants and no equities to be adjusted between them.

2.—Same—Knowledge by Insured of Clause in Policy.

Where a clause requiring a clear space of 100 feet to be maintained between the lumber insured and any dry kiln, is referred to in the body of the policy as being attached thereto and made a part thereof, the assured, in the absence of allegations of fraud or mistake, will be conclusively presumed to have had knowledge of the contents of such clause.

3.—Same—Allegations of Knowledge by Insurer.

Allegations that the insurance agent had knowledge of the fact that the lumber was piled within less than 100 feet of the dry kiln, and that he agreed to insure it as it was then situated, were insufficient to avoid the effect of the clear space clause.

4.—Same—Waiver Because of Knowledge.

Where the insurance agent issued a policy with knowledge of facts such as would render it void in its inception, if its provisions were insisted on, it will be presumed that such provisions are waived, rather than that he fraudulently delivered and received payment for an invalid policy.

5.—Same—Evidence of Clause Attached to Policy.

In an action on an insurance policy the defendant company has the right to introduce in evidence a clause or provision which is attached to the policy and mentioned in the body of it as constituting a part thereof.

6.—Practice in Trial Court—Special Issues.

It is an abuse of the statute authorizing the submission of special issues to the jury for the court to submit fifty questions to be answered, since the law does not contemplate that the jury shall find every material fact in evidence, but only upon the substantial and material issues that arise on the facts.

ON REHEARING.

7.—Fire Insurance—Parol Agreement Varying Policy.

A parol agreement of the insurance agent made prior to the execution of the policy can not be shown to vary or contradict its terms.

8.—Same—Waiver Not Presumed from Agent's Prior Knowledge, When.

The mere fact that the insurance agent had knowledge, at some time prior to the issuance of the policy, of a condition of the property violative of its terms, will not authorize the presumption that he knew such condition existed at the time the policy was issued, and waived a provision of the policy relating thereto.

9.—Same—Extent of Waiver.

Where a condition of the property violative of the policy (lumber so piled as to reach within 100 feet of a dry kiln) could readily be changed by the insured, the issuance of the policy with knowledge by the insurer of such condition, waived the requirement forbidding it only to the extent of allowing the insured a reasonable time within which to comply with the policy by removing the lumber.

Appeal from the County Court of Harrison. Tried below before Hon. H. T. Lyttleton.

T. P. Young, for appellants.

F. H. Prendergast and *A. H. Cooper,* for appellees.

PLEASANTS, ASSSOCIATE JUSTICE.—This suit was brought by P. C. Post and W. L. Sloan against the Hartford Fire Insurance Company and the Pennsylvania Fire Insurance Company to recover upon two contracts of insurance issued by said companies. The policy of the Pennsylvania company was issued on August 26, 1899, to P. C. Post, and insured said Post for one year in the sum of $1000 against loss by fire on his stock of lumber in his yard at his sawmill. The policy of the Hartford company was issued on September 14, 1899, and insured Post against loss by fire on same property in the sum of $750. Both of these policies provided that the loss, if any, should be payable to W. L. Sloan, as his interest might appear, and both contained the following stipulation: "This company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount here insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property;" and also contained the usual 85 per cent coinsurance clause. The two policies are separate and distinct contracts, executed by different companies, and create no joint liability of any kind. Each company filed a separate answer, containing general and special demurrers, and special pleas setting up the violation by the plaintiff Post of certain warranties contained in the policies, which will be hereafter set out more fully. The demurrers were all overruled, and the cause submitted to a jury upon special issues, and upon the return of the verdict, judgment was rendered in favor of the plaintiffs against the Hartford Company for $227.67, and against the Pennsylvania company for $303.57, and against both companies jointly for all costs of suit, from which judgment both of the defendants prosecute this appeal.

Appellants' first assignment complains of the ruling of the trial court in not sustaining the first special exception made by both defendants to plaintiffs' petition on the ground of a misjoinder of causes of action. These exceptions should have been sustained. There is no privity between the defendants in this case, and no equities to be adjusted between them which would authorize a joinder of the separate and distinct causes of action sued on by plaintiffs. The contracts sued on were executed by different persons and at different times, and create no joint liability, and we know of no principle of law which would authorize the plaintiff to join these defendants in one suit upon both contracts. It may be that under the facts in this case no injury could result to the defendants by being sued jointly, but each has the legal right to have his case submitted to a jury entirely disconnected from any claim which the plaintiff may have against the other, and such right can not be disregarded by the courts. The exception should have been sustained, and plaintiffs required to amend their petition and elect upon which of the

causes of action they would prosecute this suit. Schumen v. Smith, 70 Texas, 171; Oglesby's Sureties v. State, 73 Texas, 660; Dunson v. Nacogdoches County, 15 Texas Civ. App., 9.

We think appellants' third assignment, which predicates error in the failure of the trial court to sustain exceptions to that portion of plaintiffs' petition which alleges a compliance with the iron safe clause in the contracts of insurance, is without merit. The allegations of the petition are sufficient to show a substantial, if not a literal, compliance by plaintiffs with the requirements of said clause. Brown v. Insurance Co., 89 Texas, 590.

One of the defenses set up by the defendants by special plea was that each of the insurance policies sued on contained a warranty by the assured that a continuous clear space of 100 feet should be maintained between the property insured and any dry kiln, and that any violation of said warranty would render the contract of insurance void, which warranty on part of the assured is alleged to have been violated. The plaintiffs sought to avoid the effect of this warranty and its violation by the following allegations in their petition: "So far as the 100 feet clear space clause is concerned, plaintiff Post had no knowledge that said clause was attached to the policy until after the loss, and same is no part of the policy, and was not attached until after the risk was accepted. The agent of the defendant went to the mill, saw, examined, and inspected the lumber, and the space between the lumber and the dry kiln, and the mill, and knew the exact and actual distance from the lumber insured and the dry kiln, and between the lumber and the mill, and accepted and agreed to the same as it was situated."

The allegation that the plaintiff Post did not know that the clear space clause was a part of the policy is clearly insufficient. The policy of insurance is attached to and made a part of the petition, and in the body of the policy, just after the description of the property insured, the clear space clause is referred to as attached to the policy and made a part thereof, and in the absence of allegations of fraud or mistake, plaintiff, having accepted the policy, will be conclusively presumed to have had knowledge of its contents. Insurance Co. v. Holcomb, 89 Texas, 404.

The allegations as to the knowledge of the agent at the time the contract of insurance was executed of the fact that the stock of lumber was piled within less than 100 feet of the dry kiln, and that he agreed to insure said lumber as it was then situated, are, we think, insufficient to avoid the effect of the clear space clause. If, however, the agent, at the time the policy was issued, had knowledge of the existence of facts which would render the contract void in its inception if its provisions were insisted on, it will be presumed that such provisions are waived, as a contrary presumption would impute to the defendant the fraudulent intent to deliver and receive pay for an invalid policy. Insurance Co. v. Ende, 65 Texas, 123; Gray v. Insurance Co., 49 N. E. Rep., 675; In-

surance Co. v. Wingfield (Ky.), 57 S. W. Rep., 149; Insurance Co. v. Wagner, 24 Texas Civ. App., 140, 57 S. W. Rep., 876.

We think the trial court erred in refusing to allow the appellant, the Hartford Insurance Company, to introduce in evidence the clear space clause attached to the policy sued on. This clause was a part of the policy of insurance sued on by plaintiffs, and their objections to its introduction in evidence were without merit and should not have been sustained. A determination of the questions raised by the remaining assignments of errer would require us to pass upon the facts in the case, which, in view of another trial, we will refrain from doing.

The record in this case discloses that the jury were required to answer in their verdict fifty questions propounded to them by the court. The statute which authorizes the submission of special issues to the jury does not contemplace that the jury shall be called upon to specially find in their verdict every material fact in evidence, and such practice should not be allowed. The jury can only be required to find upon the substantial and material issues which arise on the facts, and to require them to find categorically the facts in the case would often render their verdict confusing, and, as in this case, apparently contradictory.

For the errors before indicated, the judgment of the court below is reversed and this cause remanded for a new trial.

Reversed and remanded.

ON MOTION FOR REHEARING.

In our opinion rendered in this cause on the 15th day of March, 1901, in discussing the allegations in plaintiffs' petition seeking to avoid the clear space clause in the policy of insurance sued on, we say: "The allegations as to the knowledge of the agent at the time the contract of insurance was executed of the fact that the stock of lumber was piled within less than 100 feet of the dry kiln, and that he agreed to insure said lumber as it was then situated, are, we think, insufficient to avoid the effect of the clear space clause." This paragraph of the opinion is inaccurate in its statement of the allegations of the petition, and when considered only in connection with the succeeding paragraphs, renders the two paragraphs confusing and apparently contradictory. As set out in a preceding paragraph of that opinion, the allegations under discussion do not show how long it was before the issuance of the policy that appellant's agent examined and inspected the lumber insured, nor is it alleged that at the time the contract of insurance was executed the agent of appellant knew that the lumber insured was within less than 100 feet of the dry kiln. No parol agreement of appellant's agent made prior to the execution of the written contract could be shown to vary or contradict the terms of the written instrument, and the mere fact that the appellant's agent may have at some time prior to the issuance of the policy visited and examined appellees' lumber yard and ascertained that the distance between the lumber and the dry kiln was less

than 100 feet, would not authorize the presumption that he knew such condition existed at the time the policy of insurance was issued, and waived the provision in the policy requiring a clear space of 100 feet to be kept between the lumber and the dry kiln. It is difficult to apply the doctrine of estoppel or waiver arising from facts within the knowledge of the agent at the time the policy of insurance was issued to the facts in this case. The provision as to the clear space between the lumber and the dry kiln not only required such clear space to exist at the time the policy was issued, but that a clear space of 100 feet should be kept between the lumber and the kiln during the existence of the policy. The character of the insured property being such that it could be easily moved, it would seem that the acceptance by the appellee of a policy containing such clause would require that he remove any lumber which might be within less than 100 feet of the kiln at the time the policy was issued, and that the waiver of said clause which might be presumed from the issuance of the policy with knowledge of existing conditions would only be to the extent of allowing appellee a reasonable time within which to comply with the provisions of the policy. We refer to the case of Insurance Company v. Prather, 62 Southwestern Reporter, 89, for an expression of our views as the effect of an antecedent parol agreement which varies or contradicts the terms of an insurance policy.

After a careful reconsideration of the question presented in appellees motion for a rehearing, we are constrained to adhere to the views expressed in our former opinion and the motion will be overruled.

Overruled.

F. M. GRIFFIN v. JESSIE MCKINNEY ET AL.

Decided March 29, 1901.

1.—Pleading—Foreign Law—Partition of Community Property.

Where, in partition of community property, the defense is that defendant bought the property with money he had earned in a foreign State, under the laws of which such money was his separate property, he must plead such matters to admit evidence thereof and of the laws of such foreign State.

2.—Practice in Trial Court—Withdrawing Announcement—Discretion.

Since it is within the discretion of the trial court to allow a party to withdraw his announcement of readiness for trial for the purpose of filing an amendment, the action of the court in refusing such permission will not be reviewed on appeal.

3.—Practice on Appeal—Foreign Law to Be Shown in Record.

Where defendant's motion for new trial to permit him to introduce the laws of a foreign State (which he was unable to adduce at the trial) shows that such laws had been obtained, the refusal of the motion will not be held error where the laws so relied on are not shown in the record on appeal, so that it can be determined whether or not they sustain defendant's contention.

4.—Community and Separate Property—Surviving Spouse.

Where a surviving husband, after his wife's death, bought land and paid for it out of his earnings from a gin and farm that were community property, this did not affect the land with the character of community property, though the husband might be indebted to the community estate for the money invested in it.

5.—Practice on Appeal—Motion for New Trial Below.

The rule requiring that an objection questioning the sufficiency of evidence must be brought to the attention of the trial court in a motion for new trial, is not applicable where the trial is had before the court without a jury.

6.—Homestead—Abandonment.

See the opinion for evidence held sufficient to show that a rural homestead had been abandoned and another acquired in town.

7.—Partition of Land—Description.

In a partition of land a tract set aside to defendant as his homestead, which is not asked to be partitioned and is adjudged not subject to partition, is sufficiently described as the house and lot on which he was residing at the death of his wife.

Appeal from Collin. Tried below before Hon. J. E. Dillard.

Abernathy & Mangum, for appellant.

W. C. Jones, F. E. Wilcox, J. M. Muse, and *Hugh McClelland,* for appellees.

GARRETT, CHIEF JUSTICE.—This was an action for the partition of land alleged to belong to the community estate of F. M. Griffin and his deceased wife, S. J. Griffin, brought by a married daughter, Jessie McKinney, joined by her husband. The other children were made parties defendant, as follows: Katie Barnes, a feme sole, and Johnnie, Nora, Janie, Jim, Ed and Maggie Griffin, who were minors and for whom F. E. Wilcox was appointed guardian ad litem by the court. The petition described six tracts of land which were alleged to belong to the community estate of the appellant, F. M. Griffin, and his deceased wife, S. J. Griffin, and to be subject to partition. It was alleged that the homestead was not included in the tracts described, and that it consisted of another and different tract situated in the town of McKinney upon which the appellant then resided. Certain personal property was described in the petition, but as there is no controversy about it, no further notice will be taken thereof. The defendants, Katie Barnes and the minor children by their special guardian, adopted the pleadings of the plaintiff, and joined in her prayer for a partition of the property. After demurring to the pleadings, the appellant denied generally all the allegations in the petition and in the answers of Katie Barnes and the minor children, and especially answered setting up the right to have a homestead of 200 acres set apart to him, consisting of the tract of 160 acres and 40 acres of the adjoining land; and that the east half of lot 234, block 67, in the town of McKinney was his separate property. Trial was had before the court without a jury and resulted in a judgment in favor of the heirs of S. J. Griffin, decreeing a partition of all the land described in the petition, except the homestead in the town of McKinney.

As shown by a bill of exception reserved to the action of the court

during the trial, on Monday, April 9, 1900, and while the appellant was being examined as a witness by counsel for the plaintiff, he said that he owned the fifth and sixth tracts of land described in the petition before he came to Texas, and while he lived in the State of Georgia, and afterwards, on examination in his own behalf, he further said that he bought said land while he resided in Fulton County, Georgia, and that all the money used in paying for it he had brought with him when he moved to Texas, and that such money was earned by him while he resided in Georgia and during his marriage with his deceased wife. That the second tract was bought in exchange for another tract for which he paid also with money acquired in Georgia during the marriage and brought with him to Texas. The plaintiff objected to the evidence because the defendant had not pleaded that the land was his separate property, and the objection was overruled, and after hearing other evidence in the cause the court postponed further hearing until Saturday, April 14th, to enable the defendant to produce evidence of the law of the State of Georgia to show whether or not the money brought from Georgia and invested in the land was the separate property of the said F. M. Griffin. When the case was again called on Saturday, April 14th, one of the counsel for the defendant stated to the court that he had visited the city of Dallas, but had been unable to procure an authenticated copy of the laws of Georgia, but after diligent search had been able to find only one copy of the laws of said State, and that was an unofficial copy; that counsel had telephoned to the city of Sherman and caused diligent search to be made there, but no copy could be found in that city. Whereupon counsel asked for further time, but the plaintiff objected and argued to the court that the defendant should not be permitted to give said laws in evidence for the reason that he had not pleaded the same in his answer. The court thereupon announced that he had changed his opinion as to the admissibility of the laws, and held that the same would not be admitted because they had not been pleaded. Thereupon defendant's counsel stated to the court that the defendant, F. M. Griffin, had told them that said land was community property, and for that reason they had not pleaded specially that it was his separate property; and further, that the reason why the defendant stated to them that said land was the community property of himself and his deceased wife was that he supposed and believed that all property acquired during their marriage was community property, without regard to the funds paid for the same. Counsel further stated that the first time they had any knowledge, intimation, or belief that said land was the separate property of the said F. M. Griffin was during his examination upon the trial by plaintiff's counsel. As soon as the court announced his ruling that the defendant would not be permitted to offer in evidence the laws of the State of Georgia, counsel asked permission of the court to withdraw their announcement of ready for trial and postpone the cause, in order that they might amend their pleadings and procure an authenticated copy of said laws, stating to the court the dili-

gence they had used to procure the same as above set out; and that from the unofficial copy which they had seen it was their opinion that the money invested in said land was the separate property of the said F. M. Griffin. Thereupon the court stated that the trial had progressed too far for a postponement of the same, and overruled the motion and proceeded to render final judgment as above stated.

Appellant filed a motion for new trial, and on April 26, 1900, an amended motion for a new trial. The grounds for a new trial set up in the motion were (1) that the court had erred in decreeing the partition of the 160-acre tract, because it was the homestead of the defendant; and (2) that the court erred in not permitting the defendant to withdraw his announcement of ready for trial in order that he might amend his pleadings and procure an authenticated copy of the laws of Georgia, as would more fully appear from the bill of exceptions taken to the ruling of the court and to exhibits attached to the motion. The exhibits attached were the affidavits of the following parties: "A". T. F. Mangum, one of defendant's counsel, showing his diligence to procure a copy of the laws, etc., and that he did not know and had no knowledge that any of the land mentioned was the separate property of F. M. Griffin until it was developed on the trial of the case. "B". M. G. Abernathy, a member of the firm of Abernathy & Mangum, counsel for appellant, that he had no such knowledge until developed as above stated. "C". F. M. Griffin, that while he stated to his counsel that the land was community property, he did so because it was his opinion of the law that being bought during the marriage made it such; and that if he had known that it was his separate property, he would have claimed it. "D". Certificate of the clerk of the county court showing that on the margin of the deed records there appeared as to the tract of 45.66 acres receipt of payment of all purchase money by "note or otherwise, on this 7th day of April, 1883;" and as to the 85.54-acre tract receipt of payment of notes mentioned in the deed and release of interest in land, dated October 17, 1882. "F" and "G". Letters of attorneys in Georgia with reference to the procuring and forwarding of a "Code for Georgia of 1882." The motion for a new trial stated that said code had been received, and was then "offered in evidence, showing that the money which the said F. M. Griffin brought to Texas from Georgia and with which he purchased the 85.54 and the 45.66-acre tracts and the tract bought back from Black was his separate money, and that said property is now his separate property." The motion itself was not sworn to. The court overruled the motion for a new trial, and the defendant F. M. Griffin now seeks on this appeal a reversal of the judgment.

The appellant, F. M. Griffin, and S. J. Griffin, his deceased wife, were married in the state of Georgia, where they resided until October, 1882, when they moved to Texas and settled in Collin county. S. J. Griffin died in May, 1894, leaving as her sole heirs the children of herself and husband above named. At the time of the death of S. J. Griffin the

land described in the petition belonged prima facie and was shown by the testimony of the defendant F. M. Griffin to be the community estate of himself and his deceased wife, except the east half of lot 234, block 67, in the town of McKinney, which F. M. Griffin acquired after the death of his wife. Griffin came out to Texas in January, 1882, and bought the 85.54 acres and the 45.66 acres. When he moved to Texas he brought with him money on hand and money the proceeds of property, all acquired during the marriage in Georgia. Out of this money he paid for the tracts of 85.54 acres and 45.66 acres, and for a tract of 81.20 acres bought from John R. Black, October 10, 1882, the sum of $1624.20 of said money. This last tract he gave in exchange at that valuation for the 160-acre tract, paying in part of the additional consideration (the entire consideration being $4800) therefor the sum of $1000 out of said funds. This deed was dated September 13, 1883. The deeds to F. M. Griffin for the 85.54-acre tract and the 45.66-acre tract are dated January 26, 1882, and describe F. M. Griffin as "late of Fulton County, Georgia."

The appellant moved upon and occupied as his home the 160-acre tract until November, 1888, when he moved to the town of McKinney, where he afterwards resided upon property belonging to him. He testified that he had moved to McKinney for the purpose of educating his children, and intended to go back to the farm and place where he had lived as soon as convenient and after the education of his children; that about three years before the trial he had gone out to the farm and marked out a place with stakes to build a house and intended to move when he got able to build; and that for about three years he had been cultivating a part of the 160 acres and using the proceeds for the support and education of his family. Prior to that time he had rented it out. It was shown by other evidence that he had declared his intention to move back as soon as he got able to build. On the other hand, it was shown that he was engaged in business in the town; voted in the city elections and had run for alderman, and had recently bought a new home to which he had moved. He married a second time in 1897.

The action of the court below in refusing to allow appellant to withdraw his announcement of ready for trial so that he might amend his pleading and further postpone the trial of the case in order to enable him to procure evidence of the law of Georgia as affecting appellant's right of property in the money invested in the land that was sought to be partitioned as the community property of himself and his deceased wife, and afterwards, on the hearing of the motion for a new trial, to grant the same, so that the appellant might amend his pleading and put in evidence an authenticated copy of the Code of Georgia for 1882, was within the sound discretion of the court trying the case, and will not be revised by this court. Plaintiff's original petition was filed June 26, 1899, and at the time of the trial the cause had been pending on the docket for nearly ten months. Appellant knew that the money invested in the land was brought by him from the State of Georgia and invested

in the property, and his ignorance of the law, if in fact, under the law of that State, the money was his separate property, can not furnish an excuse for his failure to present the defense at the trial. While his counsel may not have been aware of the fact that money acquired during appellant's residence in Georgia was invested in the property, yet they had sufficient time to learn all the facts in connection with the case. The deeds on record conveying the land to the appellant described him as "late of Fulton county, Georgia." The investment of the separate funds of the appellant in the land, if such was the fact, would make it his separate property, but it would have been a fact affecting the title to the land which would have been easily ascertained by inquiry like other facts that frequently affect titles with equities or rights not appearing on the face of the title. There is no reason offered why the defense was not made, except that in ignorance of the law the appellant told his counsel that the land was the community property of himself and his deceased wife, and that they relied and acted upon this statement. The law of Georgia, and the investment of the funds, as facts relied upon by the appellee to show that two of the tracts of the land and an interest in another, were his separate property, should have been pleaded to admit evidence thereof. Arnold v. Cauble, 49 Texas, 572; Peak v. Brinson, 71 Texas, 310. It is within the discretion of the district judge to allow a party to withdraw his announcement of readiness for trial for the purpose of filing an amendment, and this discretion will not be revised on appeal. Rev. Stats., art. 1188; Foster v. Smith, 66 Texas, 680. In Dublin v. Railway, 92 Texas, 535, the court below refused to allow the plaintiff to withdraw her announcement during the trial and plead coverture in reply to a plea of limitation. The Supreme Court in passing upon the question say: "Whether Mrs. Warner should be permitted to amend her petition after beginning the trial was within the discretion of the district judge, and we have no power to revise his action in the premises." Even if the appellant could have introduced the evidence under the general denial, the application for a continuance or postponement of the trial and the motion for a new trial were addressed to the sound discretion of the court. The application was an oral one, and a postponement was granted for five days. The motion for a new trial showed that subsequent efforts to secure the code had been successful, and that the code was before the trial judge, but under all the circumstances we can not say that the court should have granted the motion. The provisions of the code relied on to show that the money was the separate property of the appellant are not in any manner incorporated in the record so that it my appear whether or not the contention of appellant was correct. It was stated in Oliver v. Robertson, 41 Texas, 422, that if the common law was the law of marital rights in the State of Georgia at the time the money in question in that suit was acquired, the property remained the separate estate of the husband. But the courts can not take judicial notice of the law as it is in another State,—it must be alleged and proved as a fact; and the land in

Texas having been acquired during the marriage is prima facie community property and subject to partition.

We do not think that the plaintiff succeeded in showing that the east half of lot 234 in block 67 was a part of the community estate. The deed for the lot was not in evidence, and the date of its conveyance is not shown. Plaintiff relied on the testimony of appellant to show the character of the title. It is true that he said, in giving his testimony: "I owned all the land described in plaintiff's petition at the time of my wife, S. J. Griffin's death." But in testifying particularly with reference to this lot, he said: "All the property described in plaintiff's petition was bought during the marriage of myself and my first wife, S. J. Griffin, except the east half of lot 234 in block 67, and designated in said petition as the third tract." He further testified as to the manner of the acquisition of the lot, and it appeared that he paid for it out of his earnings from the gin and farm after his wife's death. This would not, however, affect the lot with the character of community property, although the appellant might be indebted to the community estate for the money invested in it. Appellees have objected to the consideration of the assignment of error raising this question, because it was not brought to the attention of the trial court in the motion for a new trial. The rule of practice which requires this is based on the reason that the court has no opportunity to pass upon the question of fact in the absence of a motion when the case has been tried by a jury. It is made the duty of the court to enter its judgment in conformity with the verdict, whether correct or not. Clark v. Pearce, 80 Texas, 146; Telegraph Co. v. Mitchell, 89 Texas, 441; Railway v. Strycharski, 92 Texas, 10. Hence the rule can have no application where the facts are found by the court.

It appeared clearly and satisfactorily from the evidence that the homestead in the country had been abandoned and a homesead established in the town of McKinney, and that the land in the country was subject to partition. It is claimed that the court failed to describe the lot or tract set apart to Griffin as his homestead. It was not necessary to do so. This property was left out of the partition, both in the petition and decree, and it is sufficiently described for identification as the house and lot on which the appellant and wife and family were residing at the time of the death of his wife, and it was adjudged to be the homestead and not subject to partition.

For the error in holding the east half of lot 234, block 67, subject to partition as community property, the judgment of the court below as to that lot will be reversed, and judgment here rendered therefor in favor of the appellant, the costs of the appeal to be adjudged against the appellees. In all other respects the judgment of the court below will be affirmed.

Reversed in part and affirmed in part.

G. W. THARP v. JOHN J. LEE.

Decided March 28, 1901.

Vendor and Purchaser—Contract—Forfeit Conditioned on Good Title.

Where a purchaser of land put up a forfeit for the performance of the contract on his part, to be returned to him if the title should be found bad, the vendor was not entitled to recover the forfeit of the depositary unless he was in position to furnish a good title and require specific performance, although the purchaser has written him that he could not raise the money to pay for the land and would have to lose the forfeit, and had given the vendor an order for the deposit, which he afterwards countermanded.

Appeal from the County Court of Harris. Tried below before Hon. E. H. Vasmer.

G. W. Tharp, pro se.

Jesse Andrews, for appellee.

GARRETT, CHIEF JUSTICE.—The appellee and one Everett Scott entered into a contract on July 14, 1899, by which Lee agreed to convey to Scott a certain tract of land which Scott agreed to take and pay therefor $3000, on or before August 16, 1899, and $200 was then paid by Scott to G. W. Tharp, the appellant, who by agreement of the parties held it as a deposit. It was agreed that if the title to the land should be found good in the opinion of Tharp, who was an attorney at law, the said sum of $200 was to be applied on the purchase money; but if the title should be found bad, the money was to be returned to Scott; and if the title should be found good and Scott should refuse to take and pay for the land, then the $200 was to be forfeited to the said Lee. The sum of $200 was also deposited with Tharp by Lee, which was to be forfeited to Scott if Lee failed to carry out the contract on his part. Lee lived in Fort Bend County, Texas, but removed to Houston, Texas, soon after the contract was entered into. Tharp was a resident of Houston, Texas. Scott lived in the State of Illinois, to which he returned after he made the contract. Lee had an abstract of the title of the land made, and presented it to Tharp, who objected to the title because two releases of vendor's liens were necessary to perfect it. On August 16, 1899, Lee had not perfected the title. On August 17th Lee received a letter from Scott, in Illinois, dated August 9th, saying that he had failed to raise the money, and would have to lose the $200. Lee then demanded of Tharp payment to him of the money deposited with Tharp by Scott. Tharp returned to Lee his own deposit, but refused to pay him the deposit of Scott, because he had not complied with his contract to furnish a good title, and paid it to Scott. Lee then brought this suit against Tharp for the recovery of the money. At the trial in the court below Lee produced a release of one of the vendor's liens, but there still remained another that had not been released.

The deposit, in case of default, was liquidated damages, and as such might be recovered as the measure of damages for the breach of the contract. 3 Pars. on Con., 156-163; Eakin v. Scott, 70 Texas, 445. Time was not of the essence of the contract. It was not made so by the parties, nor were the nature and circumstances of the contract such as to make it so. Edwards v. Atkinson, 14 Texas, 375; Primm v. Barton, 18 Texas, 226; 3 Pars. on Con., 382-386. But in order to enable Lee to recover the forfeit, he must at least show that he would have been entitled to specific performance. As he failed to furnish a good title, he was not in a position to require performance by Scott. 3 Pars. on Con., 384, 385, and note V. Even at the time of the trial, the objections to the title had not been removed. The failure of Lee to furnish a good title by August 16th was not the result of Scott's default, and while the default of Scott would relieve Lee of the necessity of tendering a deed, yet Lee would not be entitled to recover damages without showing either that he was ready to comply with his part of the contract, or that he was prevented by the default or conduct of Scott. The action of Scott subsequent to the default in giving Lee an order for the deposit which he afterwards countermanded does not affect the question.

The judgment of the court below will be reversed and judgment will be here rendered in favor of the appellant.

Reversed and rendered.

C. D. ANDERSON v. LAURA WYNNE ET AL.

Decided April 1, 1901.

1.—Land Certificate—Probate Sale of—Writing Unnecessary.

A valid sale of an unlocated land certificate may be made without being evidenced by a conveyance in writing. See evidence held sufficient to show a valid probate sale of such certificate.

2.—Limitation Against Married Woman—Law Not Retroactive.

The Act of 1895 (Revised Statutes, article 3352, section 3) as to limitation running against married women, was not retroactive in its effect, and limitation would run only from the end of the year after its passage.

3.—Same—Judgment Against Tenant Binds Landlord.

A judgment in trespass to try title in plaintiff's favor for the land against a tenant in possession will stop the running of limitations in favor of the landlord, and it does not affect the conclusive force of the judgment that it was one rendered by agreement

Appeal from Grayson. Tried below before Hon. Don A. Bliss.

E. F. Brown and *Chas. Crenshaw,* for appellant.

Judson H. Wood, for appellees.

GARRETT, CHIEF JUSTICE.—This was an action of trespass to try title, brought on May 9, 1899, by Laura Wynne and others against C.

D. Anderson and J. P. Ball for the recovery of a tract of land composed of the east half of two tracts lying together in Grayson county, to wit, 160 acres of the Meredith 320 acres, and 66½ acres of the Robert Merritt 133 acres immediately north of the Meredith. The defendant Anderson pleaded not guilty and three, five, and ten years limitation, and Ball disclaimed title. In reply to the pleas of limitation the plaintiffs, Laura Wynne, Texana Scales, and Fannie Stone, pleaded coverture, and with their coplaintiff, Ben C. Kelly, they pleaded also that a suit was brought by them on August 9, 1895, in the District Court of Grayson County against J. P. Ball for the land in controversy, and that they recovered judgment against him therefor on January 8, 1896. That at the filing of the suit and the rendition of the judgment Ball was the tenant of Anderson, and the effect of the suit and judgment was to stop the running of the statute of limitation in favor of Anderson. There was a trial by jury which resulted in a verdict and judgment in favor of the plaintiffs.

Anderson claimed the land in controversy through a deed executed to him by Ball, dated February 9, 1895, and after that date Ball remained in possession of the land as his tenant. Ball had possession prior to his conveyance to Anderson through conveyances and possession commencing March 26, 1891. His possession was from that date under deeds duly recorded, with payment of taxes. In addition to the suit against Ball, his possession was disturbed by one Lock, claiming under lease from the plaintiffs, in August, 1898, who turned out the stock that was in the inclosure and repaired the fence and took possession. In April, 1899, Ball turned Lock's stock out of the inclosure and put his own in. This was done several times. One Cobbler went into possession of the land in October, 1898, under a contract to purchase, and remained in possession until January, 1899, when he left it because the title was not fixed to suit him. Sprolls, in February, 1899, pastured stock on the land with Lock's consent. Lock left the place in the fall or winter of 1899. These acts were too late to affect the question of limitation.

Plaintiffs show title from W. C. Kelly. The plaintiffs, Laura Wynne, Texana Scales, and Fannie Stone, became married women prior to the time when the possession of the appellant commenced, and have been continually since that time under coverture. Their ownership commenced prior to that time. On August 6, 1895, the present plaintiffs filed a suit against J. P. Ball and one Morton for the recovery of the land, but Anderson was not a party to that suit. Ball had previously conveyed his title to Anderson. Plaintiffs obtained judgment against Ball and his codefendant for the land by agreement on January 8, 1896. No fraud in the procurement of the judgment was either alleged or proved even if it should be open to collateral attack.

The Meredith survey, 320 acres, was patented by the State of Texas to S. P. Hollingsworth, as assignee of D. W. Meredith, September 3, 1857. The Robert Merritt survey, 133 acres, was patented by the State of Texas to Robert Merritt, August 2, 1856. The certificate for the

headright of Robert Merritt by virtue of an unlocated balance, of which the part of that survey in controversy was located, was sold by order of the probate court of Rusk County as the property of said estate, and James H. Poston became the purchaser thereof. It was shown by circumstantial evidence that before the location of the certificate it was sold by Poston to Hollingsworth & Kelly, a firm composed of S. P. Hollingsworth and W. C. Kelly. The certificate was located for Hollingsworth & Kelly, 187 acres thereof in Rusk County, and the balance, 133 acres, in Grayson County, of which the land in controversy is the east half. By a deed of partition between S. P. Hollingsworth and W. C. Kelly the Meredith 320 acres and the Merritt 133 acres in Grayson county was divided between them by a line running north and south across both surveys, and the east half of both of them was conveyed to W. C. Kelly.

Appellant contends that the probate court proceedings were not sufficient to show a sale to Poston of the certificate by virtue of which the Merritt tract was located; and if such sale were shown, the evidence was insufficient to show a sale of the certificate by Poston to Hollingsworth & Kelly. The orders and other proceedings in the probate court are stated in the record, and we will not set them out, but refer to them as they appear, and hold that they were sufficient, in connection with the other testimony, to show that Poston became the owner of the Robert Merritt headright certificate for 320 acres by virtue of a valid probate sale. The evidence from which a sale of the certificate by Poston to Hollingsworth is inferred shows that Hollingsworth & Kelly were in possession of the certificate, and that it was located for them. That the parties resided in Rusk county, where 187 acres of the certificate was located, and no one claimed the land or exercised ownership over it or paid taxes on it except Hollingsworth & Kelly, though Wright, the administrator, who had married the widow of Merritt, lived in Rusk County. Poston lived in Rusk County for six or eight years after the Rusk County location, and moved away and lived for thirty years, and never claimed either of the locations. His son testified that his father had sold Hollingsworth some land certificates, but that he did not remember the number; and that his father never claimed to own the certificates after he left Rusk; nor did he claim to own any land in Rusk or Grayson county; and that neither he nor any of the children claimed the land. As the certificate was personal property, it was not necessary to a valid sale thereof that it should be evidenced by a conveyance in writing.

There was no error in admitting in evidence the records of the probate court of Rusk County, as complained of in the second, third, and fourth assignments of error. Nor did the court err in the third clause of the charge to the jury, as complained of in the tenth assignment of error. We do not discuss these assignments, because they are involved in our conclusions as to the sufficiency of the evidence to show the sale of the certificate through orders and proceedings in the probate court to Pos-

tón, and by him to Hollingsworth & Kelly. Plaintiffs showed perfect title in themselves to the land in controversy. Anderson failed to show title in himself by limitation. The plaintiffs, Laura Wynne, Texana Scales, and Fannie Stone, acquired their title long before the possession under which Anderson claimed commenced, and have been continuously under coverture since before that time. The change in the law making coverture a defense to limitation did not take effect until 1896. Rev. Stats., art. 3352, sec, 3. Its effect was not retroactive, but limitation would run only from the end of the year after the passage of the act. The judgment against Anderson's tenant also stopped the running of the statute of limitation. Read v. Allen, 56 Texas, 180. The fact that a judgment was rendered by agreement can not affect its conclusive force. There being no error in the judgment of the court below it will be affirmed.

Affirmed.

G. W. FORNEY v. J. J. WARD ET AL.

Decided April 4, 1901.

1.—Lease for Mining Oil—Conditions of Forfeiture—Estoppel.

See evidence held not sufficient to raise the issue as to whether a lessor was estopped from claiming the forfeiture of an oil mining lease on the ground that the lessee had failed to begin a well on the land within the time stipulated in the lease contract.

2.—Same—Beginning of Well—Question for Jury.

Where the lease provided that it should be void in case no well was begun by the lessee within a specified time, and on the last day of such time the lessee hauled some lumber on the land with which to construct a derrick for boring the well, the court correctly refused to instruct, as a matter of law, that this was a beginning of the well, but properly left that question to the jury in connection with testimony as to the general understanding among persons engaged in the business of boring oil wells as to when a well was begun.

Appeal from Navarro. Tried below before Hon. L. B. Cobb.

Hardy & Halbert, for appellant.

Frost, Neblett & Blanding, for appellees.

PLEASANTS, ASSOCIATE JUSTICE.—Plaintiff and defendants J. J. Ward and wife, Fannie Ward, on the 14th day of November, 1898, entered into a contract of lease whereby the defendants, for a recited consideration of one dollar, granted and conveyed to plaintiff seven-eights of all of the oil, gas, coal, and other minerals in and under a certain tract of land owned by defendants and fully described in said lease, and further granted to plaintiff the right to enter upon said land and conduct such operations thereon as might be necessary in the development of oil or gas wells or mines of coal or other minerals. Among other provisions

the contract of lease contained the following: "In case no well is begun and prosecuted with due diligence within four months from this date, then this grant shall immediately become null and void to both parties."

Plaintiff made no preparation to begin work under said contract until the 13th day of March, 1899, on which day he hauled a load of lumber upon said premises with which he intended to construct a derrick to be used in boring an oil or gas well. The defendant J. J. Ward was present when said lumber was placed on his land, and made no objection and did not claim that the lease was forfeited. The question of the extension of the lease and the procurement of water with which to bore the well was at that time discussed by said Ward and plaintiff, and Ward proposed to extend the lease for thirty days upon the payment to him by plaintiff of the sum of $30, and also agreed to build a tank and furnish plaintiff with water for boring purposes if plaintiff would pay him an additional $50, which amount Ward was to repay in the water necessary for the boring of four wells at the rate of $12.50 per well. Plaintiff would not accept Ward's proposition, but offered him $15 for thirty days' extension of the lease. This proposition was not accepted by Ward, though he did not then positively decline it, and plaintiff understood that he would come to town the next day and let him know whether or not he would accept the offer of $15 for an extension of the lease. Ward did not go to town the next day, and in the evening plaintiff went out to Ward's place to see if he had decided to accept his proposition. They failed to agree upon terms for the extension of the lease, and plaintiff then told Ward he would go to work on the well under the original agreement, and on the next day, March 15, sent out three wagons with lumber to be used in the prosecution of the work. When these wagons reached the premises the gates were locked and Ward refused to allow plaintiff to enter upon the premises, claiming that the lease had been forfeited. There was proof that it was worth $2.50 per load to haul lumber to defendant's premises. When plaintiff informed Ward on the 14th that he intended to proceed with the work of boring the well under the original lease, Ward did not claim that the lease was forfeited, and made no objection to plaintiff's proposal to proceed with the work. Upon Ward's refusal to allow plaintiff to enter upon the premises and proceed with the work contemplated by the lease, plaintiff brought this suit to enforce his rights under said lease contract, and to enjoin the defendants from interfering with the carrying on of operations contemplated by said lease. The defendants answered by general demurrer and general denial. The trial of the cause in the court below resulted in a verdict and judgment in favor of the defendants, from which judgment this writ of error is prosecuted.

The first assignment of error complains of the refusal of the trial court to submit to the jury special instruction number 2, requested by plaintiff, which instruction is as follows: "If the jury believe from the evidence that the defendant permitted plaintiff to go into possession of his premises for the purpose of putting down a well, and that the plain-

tiff expended money and labor with the defendant's consent both on the 13th and 15th days of March, 1899, in pursuance of his purpose to so put down said well, then defendant should be estopped from denying that plaintiff had complied with his contract."

We do not think the issue of estoppel is raised by the evidence. When plaintiff hauled the load of lumber to defendant's premises on the 13th of March, the lease contract had not expired, and there is no evidence of any act done or word spoken by the defendants on that day which could lead plaintiff to believe that the defendants would waive any of their rights under the contract; on the contrary the evidence shows that both parties, recognizing that the contract was about to expire, began negotiations for its extension, and that the defendants demanded $30 for an extension of the contract, thereby notifying plaintiff that they would claim a forfeiture of the contract as soon as the time in which plaintiff was to begin the work should expire. It is true defendants did not in express words tell plaintiff on the 14th of March that he would insist on a forfeiture of the lease because of the failure of plaintiff to begin work in the time agreed on, but they still demanded the $30 for an extension of the lease, and refused to accept plaintiff's offer of $15, and neither said nor did anything to induce plaintiff to expend any further labor or money in attempting to carry out said contract. The defendant J. J. Ward testifies that the reason he did not tell plaintiff on the 14th that he could not go on with said work was that he did not think the lease expired until that day, and did not think he had the right to stop plaintiff before the lease had expired. The charge requested was not applicable to any issue raised by the pleadings or the evidence, and the court below properly refused to submit same to the jury.

The second assignment complains of the refusal of the trial court to submit to the jury special instruction number 1, requested by the plaintiff, which instruction is as follows: "If the jury find from the evidence that the plaintiff, before the termination of the lease, hauled lumber on the defendants' land for the purpose of beginning the construction of an oil well and pushing it diligently to completion, that such is the beginning of the well as contemplated by the contract."

The court below did not err in refusing to give the jury this instruction. It certainly can not be contended that the plain import of the words used in the contract is that any work done preparatory to the boring of the well would be the beginning of the well as contemplated by the contract, and the court could not so determine the meaning of the contract as a question of law. The issue as to the meaning of the term used in the contract, considered in connection with the testimony in the case as to the general understanding among persons engaged in the business of boring oil wells as to when a well was begun, was submitted to the jury under proper instructions, and the jury found that a well was not begun, as that term was used in the contract, until the actual boring in the ground was commenced. This finding of the jury is supported by

the great preponderance of the evidence, and is not assailed by the plaintiff.

The third special instruction requested by the plaintiff, the refusal of which is made the ground of error urged in the third assignment, in effect presents the same proposition of law contained in the first special instruction above considered, and the court below did not err in refusing to submit same to the jury. We find no error in the judgment of the court below and it is in all things affirmed.

Affirmed.

ORIENT INSURANCE COMPANY v. BERTHA LEE PRATHER ET AL.

Decided April 5, 1901.

1.—Fire Insurance—Clause Against Additional Insurance—Parol Evidence Varying.

Parol evidence that the insured informed the agent of the insurance company soliciting the insurance that she intended to take out additional insurance is not admissible to vary the terms of the policy subsequently issued and containing a clause stipulating against additional insurance unless agreed to by the company in writing indorsed on the policy.

2.—Same—Waiver.

The issuance of the policy with such notice of the intention of the insured to take out additional insurance does not warrant the presumption of a waiver of such stipulation.

3.—Same—Stipulation Against Additional Insurance Valid.

The provision in an insurance policy against additional insurance is reasonable and proper, and its violation renders the entire policy void.

Appeal from Anderson. Tried below before Hon. A. D. Lipscomb.

N. A. Stedman, W. B. Teagarden, and *G. H. Gould,* for appellant.

Campbell & McMeans, for appellees.

PLEASANTS, ASSOCIATE JUSTICE.—Appellees brought this suit to recover upon a policy of fire insurance issued by appellant, whereby appellees' stock of goods and store fixtures situate in a storehouse occupied by them in the city of Dallas was insured against loss by fire in the sum of $300. The policy sued on contained the following provision: "This entire policy, unless otherwise provided by agreements indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The defendant in the court below pleaded, among other defenses set up in its answer, a violation by plaintiffs of the provision of the policy above quoted, and averred that plaintiffs had, without the knowledge of defendant, obtained other and additional insurance on the same prop-

erty, and that no permission or consent was ever granted for such additional insurance either orally or in writing.

Upon the trial of the cause in the court below the plaintiff, Bertha Prather, and her witness, Mrs. W. H. Darrah, were permitted to testify, over the objections of defendant, in substance that one Evan Morgan, an agent of defendant who solicited the insurance evidenced by the policy sued on, in a conversation with said Bertha Prather three days before the execution of the policy, told her that the taking out of additional insurance on the same property after taking out a policy with the defendant would not destroy said policy; that appellee then told Morgan that she intended to take out additional insurance on her stock in the spring, and asked if she would have to go to him and get consent or permission or notify him when she got ready to take out such additional insurance on her stock, to which the said Morgan replied: "No, that she could go to anyone else and take out insurance as much as she pleased, and did not have to go to him or the defendant company or any of its agents and notify them of the taking out of additional insurance."

This testimony was objected to by the defendant on the ground that it varied and contradicted the terms of the written contract evidenced by the policy of insurance, entered into by plaintiff and defendant after said alleged conversation occurred, and that all prior parol negotiations and conversations concerning the terms of the written contract were merged in said contract when the same was executed, and could not be proved to alter or vary the terms of the contract.

It is unnecessary to cite authorities upon the general proposition that in the absence of allegations and proof of fraud, accident, or mistake, evidence of an antecedent parol agreement is inadmissible to vary or alter the terms of a written contract. That this rule is as applicable to insurance policies as to other written contracts is well settled. The Supreme Court of the United States in the case of Insurance Company v. Mowry, 96 United States, 547, in discussing the question as to the admissibility of evidence to prove a parol promise made at or before the issuance of the policy as to the waiver of the payment of premiums uses this language:

"By the express condition of the policy, the liability of the company was released upon the failure of the insured to pay the premium when it matured, and the plaintiff could not recover unless the force of this condition could, in some way, be overcome. He sought to overcome it by showing that the agent, who induced him to apply for the policy, represented to him, in answer to suggestions that he might not be informed when to pay the premium, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no such notification was given to him before the maturity of the second premium, and for that reason he did not pay it at the time required. This representation, before the policy was issued. it was contended in the court below, and in this court, constituted an

estoppel upon the company against insisting upon the forfeiture of the policy. But to this position there is an obvious and complete answer. All previous verbal agreements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premiums to be paid, was therein expressed, for the very purpose of avoiding any controversy or question respecting it. The entire engagement of the parties, with all the conditions upon which its forfeiture could be claimed, must be conclusively presumed to be therein stated. * * * The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstances that the policy subsequently issued alone expresses its contract, an estoppel from the representations of the party can seldom arise, except where the representations were based upon a matter relating to a present or a past state of things. If the representation relates to something to be afterwards brought into existence, it will amount only to a declaration of an intention or an opinion, liable to modification or abandonment upon a change of circumstances, of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel can not arise from the promise as to future action, with respect to a right to be acquired by an agreement not yet made."

The same rule is announced in the case of Thompson v. Insurance Company, 104 United States, 252, and by the Supreme Court of Arkansas in the case of Insurance Company v. Bromwell, 34 Southwestern Reporter, 83.

Appellees do not contend that the rule which forbids the proof of a prior parol agreement to vary or contradict the terms of a written contract is not applicable to insurance policies, but insist that notice of an intention to take out additional insurance may be given as well before as after the first insurance is taken out, and that the issuance of the policy of insurance by the appellant with knowledge of the fact of appellees' intention to take out additional insurance was a waiver of the provision in said policy against additional insurance. The case of Insurance Company v. Griffin, 66 Texas, 232, cited and relied on by appellees does not sustain their contention. In that case it is simply held that a condition in an insurance policy that no other insurance shall be obtained upon the same property without the consent of the company issuing said policy is satisfied by a notice of intention to take other insurance consented to by the former company, and verbal consent of the agent with knowledge on his part that it will be acted upon is a waiver of the requirement that the consent of the company shall be expressed in writing on the policy. There is nothing in that opinion from which it can be inferred that proof of a parol agreement as to additional insurance made prior to or contemporaneous with the written

contract of insurance and which contradicted the terms of the written contract would be held to be such notice of an intention to take out additional insurance as would satisfy the provision in the contract of insurance that no additional insurance should be obtained upon the property covered by the policy without the consent of the company issuing said policy.

In the cases of Insurance Company v. Mowry and Insurance Company v. Bromwell, supra, the court distinguishes between the acts of an agent waiving an existing forfeiture, or one that would exist by reason of the existence of certain facts, and the parol agreement of an agent that certain conditions in a written contract about to be executed would not be enforced. Upon this subject the court in the Bromwell case say: "This doctrine of estoppel and waiver has no application when the declaration of the agent refers to rights pertaining to a contract yet to be made to which the person complaining is to be a party, for in such case he has it in his power to protect himself by proper stipulations in the contract when it is reduced to writing."

We think the distinction is clear. If at the time the policy of insurance sued on in this case was issued appellees had additional insurance on the same property, and the agent of the company knew such fact, the delivery of the policy under such circumstances would be held a waiver by the company of the provision against additional insurance existing at the time the policy was issued, because the existence of such additional insurance would render the policy void in its inception if said provision was insisted upon, and to presume that such provision was not waived would be to impute to the company the fraudulent intent to deliver and receive pay for an invalid policy. Insurance Co. v. Ende, 65 Texas, 123. The application of this doctrine can not be made to the case at bar, as the policy when delivered was not void under any of its provisions by reason of any existing fact, and no waiver of its provisions can be presumed against appellant.

We think the evidence objected to was clearly inadmissible for any purpose, and appellant's objecions to its introduction should have been sustained.

The undisputed facts in this case show that after the policy of insurance sued on was issued, appellees, without the consent of appellant, obtained additional insurance upon the same property, and appellant had no notice of such additional insurance prior to the loss of said property by fire. The provision in the insurance policy against additional insurance has been held by the courts to be reasonable and proper (Insurance Company v. Griffin, supra), and by the terms of said provision its violation rendered the entire policy void.

The judgment of the court below will be reversed and judgment here rendered in favor of appellant, and it is so ordered.

Reversed and rendered.

SECOND DISTRICT, 1901.

GULF, COLORADO & SANTA FE RAILWAY COMPANY v. J. E. KNOX AND WIFE.

Decided March 2, 1901.

1.—Negligence—Railway Brakeman—Low Bridge—Warning—Charge.

An instruction to the effect that if deceased, a brakeman in defendant's employ, was advised by the book of rules furnished him at the time he was employed that it was dangerous to stand erect on the top of cars while passing through a certain bridge, he assumed the risk of injury, and if killed by reason of so doing, his parents could not recover, was properly refused, because it took from the jury the issue as to whether such warning was adequate.

2.—Same.

It being negligence for the railway company to construct bridges dangerous to the lives of its employes, and provide no contrivances to give warning of them to brakemen on approaching trains, it can not excuse itself by simply showing that the brakeman knew, before receiving the injury, that the bridge was so low he could not pass it with safety while standing on top of the cars.

Appeal from Tarrant. Tried below before Hon. Irby Dunklin.

J. W. Terry, for appellant.

Carlock & Gillespie, for appellees.

HUNTER, ASSOCIATE JUSTICE.—This suit was brought by the father and mother to recover from the railroad company damages occasioned by the death of their minor son, Alvin Knox, a brakeman in appellant's employ who was killed on December 26, 1899, by a crossbeam on the north end of appellant's steel bridge across the Trinity River at Fort Worth, while walking back to the rear end of the train on top of a furniture car. There was a verdict and judgment for the appellees of $1000, apportioned equally between the father and mother, and from this judgment the company has appealed.

The evidence was sufficient to establish that the son was a minor, about 20 years old, of ordinary intelligence; that he had been in the employ of the company as call boy at Cleburne, and upon his own application made to the company on August 17, 1899, stating that he was over 21 years old, had been employed as a brakeman on a freight train, his run being from Cleburne, Texas, to Purcell, I. T.; that he had made seven or eight round trips over the portion of the road named, thus having passed through and over the bridge on which he was killed some fourteen or fifteen times; that in the printed application for the posi-

tion of brakeman he was made to sign a statement that he understood that every employe of said company whose duties were in any way prescribed by the rules must always have a copy of the rules at hand when on duty, must be conversant with every rule, must render all assistance in his power in carrying them out, and agreed that such rules, including any changes or additions thereto, should be a part of his contract of employment; that he understood that at some points on the line there were platforms, sheds, roofs, water-tank frames, telegraph poles, bridges, and other obstructions which may be dangerous, and that he must inform himself of such obstructions and use due care to avoid injury thereby; that he understood that it is dangerous to stand erect upon cars, and especially cars of extraordinary height, while passing over, through, or under bridges or viaducts, trolley wires or other overhead structures as shown under warnings on time cards at which are no telltales or other warnings, and that necessary caution must be used by all employes to protect themselves from injury from all overhead structures at said points while riding on top of cars. That he was furnished with a printed time card and rules which contained the following: "All employes are expected to protect themselves from personal injury by avoiding risks. Those who may receive injuries on account of taking risks will have no claim on the company.

"Warnings.—All employes are hereby notified that it is dangerous to stand erect upon cars, and especially cars of extraordinary height, where passing over, through, or under the following named bridges or viaducts, and necessary precaution must be used by all employes to protect themselves from injury from overhead structures at said points while riding on top of cars."

Here follows a list of bridges, twenty-eight being on the main line, and in this list is "Bridge No. C 217, between milepost 348 and 349, name Trinity River."

Said bridge No. C 217 is the bridge where Knox was killed. The defendant company has no telltales or whiplashes or anything of that sort in use for the purpose of warning employes of the approach to these bridges.

It further appears from the evidence that all the crossbeams of the bridge in question were 20 feet and 6 inches above the rails, except this one at the north end of the bridge, which was 12 inches lower than the others. It does not appear that Alvin Knox had ever been informed of this fact. At the time he was killed he was walking erect on a furniture car back to his position on the caboose—said car was about three feet higher than an ordinary car—when the back of his head struck the said low beam, and his skull was crushed, from which injury he died about twelve hours later. The said beam at the north end of the bridge being a foot lower than the others, and only 19 feet and 6 inches above the rails, made the bridge a dangerous structure for brakemen to pass through, standing or walking on the tops of cars, especially tall cars, and one calculated to deceive them and thus cause them to receive unexpected injuries. For this reason the bridge seems to have been negli-

gently constructed, and constituted a dangerous menace to life, and a trap in which appellant's brakemen are liable at all times to loose their lives in passing through it, especially as no "telltales" or "whiplashes" have been erected to warn them of their near approach to the bridge.

There are but two assignments of error, both complaining of the court's action in refusing to give special charges asked. One of the charges was a peremptory one to find for the defendant; the other was as follows:

"If you believe from the evidence in this case that Alvin Knox, son of plaintiffs, on the 17th day of August, 1899, made a written or printed or partly written and partly printed application to the defendant for employment by it as a brakeman on its railroad, and that said application was signed and executed by him, and if you further believe from the evidence that there is on said application a written or printed statement signed by the said Alvin Knox by the name of A. Knox, in which statement the said Alvin Knox acknowledges the receipt of a copy of the current timetable and book of rules and regulations for the information and government of employes of defendant, and that he, the said Alvin Knox, carefully read and understood the same, and if you further believe from the evidence that rule 159 in said current time table and book of rules and regulations states that all employes are notified that it is dangerous to stand erect upon cars of defendant, and especially cars of extraordinary height, while passing over or under certain bridges and viaducts named in said rule, and that the bridge of defendant over Trinity River, where Alvin Knox was killed, is mentioned in said rule, and if you further believe that said rule requires all employes of defendant to use all necessary precautions to protect themselves from injury from overhead structures at said points named in said rules, while riding on the top of cars of defendant, and if you further believe from the evidence that Alvin Knox, while passing over the said Trinity River bridge on the top of a car of defendant of either ordinary or extraordinary height, stood or walked erect, and if you believe that said Alvin Knox was then and there killed while so passing said Trinity River bridge, and if you further believe from the evidence that the proximate cause of the death of said Alvin Knox was the result of his so standing or walking erect while so passing over said bridge, and if you further believe from the evidence that the bridge over the said Trinity River was constructed and being used by the defendant when the said Alvin Knox was employed by it, and was in the same condition as to height that it was at the time the said Alvin Knox was killed, and that the risk or danger of going over the same with the cars of defendant had not been increased during the time the said Alvin Knox was employed by the defendant, then you are instructed that the risk or danger, if any, which the said Alvin Knox incurred when he was killed, was assumed by him, and he can not recover in this case, and you will find for the defendant, and so say by your verdict."

Counsel's third proposition under this requested charge raises the

only important question in the case, and that proposition is as follows: "Having been advised in writing that it was dangerous to stand under the bridge in question on any cars, and especially on cars of unusual height, and having been also advised that there were no telltales or other warnings at said bridge, Alvin Knox, by accepting and continuing in the employment as a brakeman, as a matter of law, assumed the risk of injury from any such bridge, and, as a matter of law, was guilty of contributory negligence."

Judge Redfield, of the Supreme Court of Vermont, once said in an opinion delivered by him, that "a great lawyer is master of his case, and presents in an appellate court but few points, and those only upon which his case turns." The able counsel of appellant in this case show themselves to be great lawyers, according to Judge Redfield's rule, for they only present, in effect, but one assignment of error, and raise substantially but one point, and that is the one upon which the case turns.

The proposition of appellant is that if Alvin Knox was advised by the book of rules that it was dangerous to stand erect on the top of the cars while passing through this bridge, he assumed the risk of injury, and if killed by reason thereof the parents could not recover. This assumes that the delivery to a brakeman, when he is first employed by the company, of a printed book of rules notifying him that the bridges *may* be dangerous, or *are* dangerous, to pass under standing erect, is sufficient warning for the balance of his life to place the risk on him of injury, if he should under any stress of circumstances, forget the warning and be injured by the dangerous structure. It takes the issue from the jury as to whether such warning was adequate. Many railroad men testify in this case that the best way known of preventing injury to brakemen by low overhanging bridges is to erect "telltales" or "whiplashes," as they call them, overhead across the road near the dangerous bridge, so that the man standing or walking on the top of a car coming in contact with the suspended ropes or strips of leather or wires will be warned at the very instant the danger becomes imminent, and can stoop or sit down until the bridge is passed. It is said to be a cheap contrivance, quite effectual, and in use on many of the best and modern equipped railroads. The special charge and the proposition ignore these features raised by the evidence in this case, and hence, for this reason, was properly refused.

Mr. Beach, in his work on Contributory Negligence, speaking of these low bridges, says: "The duty of freight train men requires them, or some of them, to be upon the top of the cars much of the time the train is in motion; they must stand erect and go rapidly from one car to another in the night as well as in the daytime. If the roof or overstructure of the bridge is so low that it will strike a brakeman standing erect upon the top of his train, it is essentially a murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the corporations in building and maintaining these

mantraps." 2 ed., sec. 63; Shearm. & Redf. on Neg., 4 ed., sec. 198, et seq.; Railway v. Cooley's Admr., 49 S. W. Rep., 340. In Cooley's case, supra, Justice Paynter, speaking for the Court of Appeals for Kentucky, said: "It was a constant peril to the lives of its employes whose duties called them on top of trains. When a brakeman's life is lost in consequence of such negligence, the company can not excuse itself by simply showing that he knew, before receiving the injury, the bridge was so low that he could not pass over it with safety while standing on top of the cars. Exigencies or other causes may arise in the discharge of his duties which may cause him to forget the danger with which he is threatened, and thus cause his failure to avoid injury. * * * If he failed to measure the exact distance between the top of the car and bridge with his eye, or did so, but failed, after reasonable effort, to get his body in exact position to avoid a collision with the bridge, it seems to us that the appellant should suffer the loss, and not the intestate's estate." Railway v. Duvall, 54 S. W. Rep., 741; Railway v. Kime, 21 Texas Civ. App., 271.

Finding no error in the judgment, it is affirmed.

Affirmed.

Writ of error refused.

ROWENA AND C. D. CATES v. THE UNKNOWN HEIRS OF W. L. ALSTON.

Decided March 2, 1901.

Trespass to Try Title—Action Against Unknown Heirs—Pleading.

In an action of trespass to try title to lands brought against unknown heirs, plaintiff's petition must, under article 1504c, Revised Statutes, set forth plaintiff's title, as well as the claim of defendants, if known, although in other cases of trespass to try title this is not requisite under article 5250, relating generally to that form of action.

Appeal from Hardeman. Tried below before Hon. G. A. Brown.

R. E. Carswell, for appellants.

Robert Cole, for appellees.

CONNER, CHIEF JUSTICE.—This suit was instituted by appellants against the unknown heirs of W. L. Alston to try the title and recover possession of the land described in appellant's petition. The petition did not set out the title of appellants nor the claim of appellees, but was in the usual form of petitions in trespass to try title; alleging that plaintiffs were the owners of the land described and were in possession thereof, and were ousted therefrom by appellees, whose residence was alleged to be unknown, with prayer for citation, judgment of restitution, and general relief.

The sufficiency of this petition was questioned by a general demurrer and special exception presented by counsel appointed by the court to represent appellees, who were cited by publication. Said demurrers having been sustained, and appellants having declined to amend, judgment of dismissal was entered, and hence this appeal.

We have not been favored with brief in behalf of appellee, nor have we been able to find where the precise point in question has ever been decided in this State. We are of opinion, however, that the court properly held the petition insufficient. Without question the general rule is and has long been that our statutes regulating the remedy of trespass to try title are sufficiently comprehensive to include all cases wherein the title or right of possession to real property is directly involved; and that ordinarily in this character of action a petition, as in the case before us, in substantial compliance with the form prescribed by the statute, is sufficient, and not subject to the special exception urged below, which was that it does "not set forth the title of plaintiff, and does not set forth the claim of defendants, nor state that the same is unknown to plaintiffs." See title 106, chap. 1, Rev. Stats.; Moody v. Holcomb, 26 Texas, 719; Sloan v. Thompson, 4 Texas Civ. App., 419; Titus v. Johnson, 50 Texas, 238; Hardy v. Beaty, 84 Texas, 564.

But an act entitled "An act to provide for determining the rights of nonresidents, persons unknown, and transient persons, to property in Texas" was passed by the Legislature of Texas, and approved April 27, 1893 (see General Laws 1893, page 77), which we think must be held to apply to this case. In the chapter regulating "Process and Returns" is to be found the law under which it is insisted this suit was prosecuted. This is article 1236, Revised Statutes, in force long prior to the Act of 1893. It provides that: "Where any property of any kind in this State may have been granted or may have accrued to the heirs, as such, of any deceased person, any party having a claim against them relative to such property, if their names be unknown to him, may bring his action against them, their heirs or legal representatives, describing them as the heirs of such ancestor, naming him; and if the plaintiff, his agent or attorney, shall at the time of instituting the suit, or any time during its progress, make oath that the names of such heirs are unknown to the affiant, the clerk shall issue a citation for such heirs addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the sheriff or constable to summon the defendant by making publication of the citation in some newspaper in his county, if there be a newspaper published therein, but if not, then in the nearest county where a newspaper is published, once in each week for eight successive weeks previous to the return day of such citation."

It will be observed that under this article of the statute the requisites of the petition are not given, and hence a petition in the form prescribed by the chapter relating to suits in trespass to try title might well be held sufficient. The Act of 1893, however, undertakes to regu-

late a particular character of suit. The third section of that act provides that: "The pleadings in such case shall set forth the title of the complainant, as well as the claim of the defendant, if known." This act was embodied in the Revised Statutes of 1895 as chapter 22, title 30, among other general provisions, and carried forward with article 1236, and these several provisions must therefore be construed together. We must so construe them as that both shall stand, if it can be done.

Construing articles 1236, 5250, and chapter 22, title 30, of the Revised Statutes together, we are of opinion that in suits of this character the petition should set forth the title of the plaintiff and the claim of defendant if known. Articles 1236 and 5250 declare general rules, while chapter 22 undertakes to regulate a particular subject within which this suit falls. There is no necessary conflict between the provisions named. Article 1236 confers the right of suit, but prescribes no form of pleading. Article 5250 prescribes a form of petition in trespass to try title, but does not inhibit the requisites prescribed by article 1504c of said chapter 22. Article 1504c merely gives a more particular designation of the requisites of the petition in cases such as this. We think compliance with article 1504c easy of observance, and that our construction of the articles named is conducive to the preservation of the rights of unknown heirs. We therefore affirm the judgment.

Affirmed.

Writ of error refused.

DORSEY PRINTING COMPANY v. GAINESVILLE COTTON SEED OIL MILL AND GIN COMPANY.

Decided March 2, 1901.

1.—Contract of Sale—Acceptance—Charge.

In an action to recover a typewriter shipped subject to trial and acceptance, it was error for the court to instruct that if defendant notified plaintiff's authorized agent that the machine was satisfactory before plaintiff revoked its offer to sell, they should find for defendant, where the whole conversation between plaintiff's agent and the defendant, upon which the instruction was predicated, showed that defendant had no intention then of notifying the agent that he accepted the machine, and the only authority shown on the part of the agent was that he was plaintiff's traveling salesman.

2.—Same—Same—Real Issue Ignored.

Where the real issue in the case was as to the identity of the machine shipped with one mentioned in plaintiff's prior letter making an offer to sell, a charge that if the jury should find that a certain letter from defendant to plaintiff contained an acceptance, they should return a verdict for defendant, was erroneous in ignoring the question of identity of the machine.

3.—Same—Evidence Not Too Remote.

Upon the issue as to whether plaintiff offered at $50 the new machine shipped, or whether that offer and price applied to a different machine, it was competent for plaintiff to give in evidence letters written by it to defendant some eight months prior to the transaction, pricing a second-hand machine for $50 and new machines, of the kind shipped, for $102.

Appeal from the County Court of Cooke. Tried below before Hon. B. F. Mitchell.

Hill & Cofer, for appellant.

Davis & Garnett, for appellee.

CONNER, CHIEF JUSTICE.—The appellant, the Dorsey Printing Company, sued appellee, the Gainesville Cotton Seed Oil Mill and Gin Company, in the Justice Court to recover possession of a No. 6 New Century typewriting machine, of the alleged value of $102.50, and of which said printing company asserted title.

Appellee answered by general denial; plead ownership by virtue of a sale of said machine to it, and especially set up the anti-trust law of this State in bar of the suit. The judgment in the Justice Court was in favor of appellee, and on appeal to the County Court the trial before a jury resulted in a like judgment. Hence this appeal.

The facts show that on November 24, 1899, appellant wrote to appellee a letter, the material part of which reads: "If you will permit us, we will ship you an exceptionally good typewriter to examine, and if it suits you, we will sell it to you at $50, payable either cash, or $10 cash and $5 per month." At the head of this letter was an electrotype picture, or facsimile reproduction, of a No. 6 New Century typewriter, and the following printed words: "Dorsey Printing Co. General Dealers for Texas, Indian and Oklahoma Territories in the New Century Caligraph." The words "New Century Caligraph" being in large red type; in that particular differing from the remaining contents.

On November 27, 1899, appellee wrote appellant as follows:

"The Dorsey Printing Co., Dallas, Texas:

"Dear Sirs.—We received your letter of the 24th, and in reply will say that you may ship us one of the New Century typewriters at your own expense, and after we try it thoroughly and are satisfied with it, we will pay you for it, and if it don't suit, will ship it back at your expense.

"If this arrangement suits you, send the machine at once.

"GAINESVILLE COTTON SEED OIL MILL AND GIN CO.,
"E. P. Bomar, Mngr. E."

On November 30, 1899, upon paper with letterhead as before described, appellant wrote appellee the following letter, to wit:

"Gainesville Cotton Seed Oil and Gin Co., Gainesville, Texas:

"Gentlemen.—We have your esteemed request of the 27th inst., and will forward to you as quickly as we can one of the No. 6 New Century Caligraphs by prepaid express, because we are satisfied that a fair trial of this machine will convince you it is precisely what you want.

"Thanking you for your favor, we beg to remain, very truly yours,

"DORSEY PRINTING COMPANY. J. W. H."

Appellant thereupon shipped to appellee the typewriter involved in this suit, but did not transmit the shipping bill containing the price therefor, $102.50, or otherwise notify appellee of the price to be charged.

December 15, 1899, A. M. Hoyle, a traveling salesman for appellant company, whose authority was not otherwise shown, was in the city of Gainesville, and having heard that appellee had purchased a New Century typewriter No. 6 for $50, the regular price of which was $102.50, went to the office of appellee to inquire about it. He there met Mr. Bomar, appellee's president and manager, and Mr. Easley, the stenographer. There is some difference in the testimony as to the conversation that then took place. Bomar testified that in the beginning, and before he knew for whom Hoyle was acting, he stated to the latter that he did not desire to purchase a typewriter; that he was satisfied with the one shipped him for trial, and would keep it. All parties agree, however, that Hoyle then insisted, in effect, that the machine in controversy could not be sold for $50, and was not the machine offered therefor in said letter of November 24, 1899. Bomar declined to act with Hoyle, but in about an hour after this meeting wrote appellant, declaring his satisfaction with said machine and his acceptance thereof, inclosing his check for $50 in payment as per terms of letter of November 24, 1899. Appellant immediately denied having offered the New Century for $50, and declined to accept said check, which was tendered in return through Mr. Hoyle, and demand made for return and possession of the typewriter, which being refused, appellant instituted this suit as stated.

We are of opinion that there was error as assigned in the third paragraph of the court's charge. The jury were here authorized to find for appellee, if they found that the machine was shipped to appellee on trial, and it proved satisfactory, and appellee, "thereafter notified either plaintiff or an authorized agent of plaintiff that said typewriter was satisfactory before plaintiff revoked its offer." This was evidently intended to apply to the evidence of Bomar, that in the beginning of the Hoyle conversation above mentioned he informed said Hoyle that the machine was satisfactory, and the jury may and very probably did construe this as an acceptance that fixed the right of appellee to the machine in controversy. Such construction, in our judgment, would constitute a perversion of the true purport of the conversation. If Bomar, appellee's manager, made the statement relied upon first as stated by him, it was but part of a general conversation that should be construed as a whole, and was evidently not intended by him as an acceptance of an offer of sale then unclosed. He would hardly thus attempt to formally complete a proposition of sale on the part of appellant with one wholly unknown to him, and not known to have connection with appellant. Hoyle was there vigorously asserting, in effect, that appellant had made no such offer as insisted upon by Bomar, that the offer made in the letter of November 24, 1899, related to a second-hand typewriter, and not to a New Century No. 6, and the words attributed to Bomar in the same imme-

diate connection ought not be be given the effect of such acceptance as was necessary to fix appellee's title to the machine in controversy. In addition to which, authority to accept or reject in Hoyle was not shown. He was shown to be a mere traveling salesman, and the court instructed the jury that if they so found, Hoyle would not have power to revoke; thus rendering it possible for the jury to find that by reason of Hoyle's want of authority appellant's offer was not withdrawn by him in the conversation with Bomar on December 15, 1899, but that nevertheless Hoyle had such authority as would make effective the asserted acceptance in this conversation.

We think this paragraph of the court's charge subject also to further objection. The jury were therein instructed, in substance, that if they found that Hoyle was without authority to revoke the offer of appellant, that appellee's letter of December 15, 1899, constituted final acceptance of the machine in controversy, and that in such case they should find for appellee. The issue of the identity of the subject matter of appellant's offer was thus evidently excluded. Ordinarily it is the duty of the court to construe and declare the legal effect of writings relied upon as constituting a contract. Here the letter of November 24, 1899, read in the light of all the circumstances, was somewhat ambiguous. Appellant was insisting that the machine therein really offered for $50 was not the one in controversy. Appellee insisted to the contrary, and this was the vital issue in the case, and should not have been excluded in this clause of said section of the charge. If the letter of November 24, 1899, was written with the design that appellee should understand therefrom that a New Century No. 6 was offered for $50, or if a person of ordinary care and prudence would have so understood it, and appellee did in fact so understand it, and without knowledge of mistake, if any, and before withdrawal of the offer, accepted the proposition, then appellant can not plead that the offer was intended in fact to refer to another machine. If, on the contrary, the offer related to and was intended to be of some other typewriter, and would have been so understood by the exercise of reasonable care and prudence, there was no sale; for it is unquestionably true in the law of contracts, including sales, that the minds of the parties must meet upon the same thing at the same time. Benj. on Sales, sec. 418; Tied. on Sales, sec. 33. Or if, under the circumstances, a person of ordinary care and prudence would have understood the offer to be of a New Century No. 6, and appellee in fact so understood it, yet if in fact it was not so intended by appellant, and if appellee, at any time and by any means prior to due acceptance of it, had notice that the machine in controversy was not the one intended by the offer of November 24, 1899, then no sale took place. Dunn v. Price, 87 Texas, 321.

What we have here said also illustrates the relevancy and importance of certain other correspondence between the parties, and to the exclusion of which appellant assigns error. The first was a letter from appellee to appellant, dated March 12, 1899, inquiring for price, etc., of typewriter.

On the 13th, appellant answered, quoting prices and terms of second hand machines at $35 and $50, and calling attention to a folder accompanying letter with picture of New Century No. 6 engrossed thereon, giving the price thereof as $102.50. It is insisted that these letters were too remote in point of time, and unconnected with the offer under consideration. This but goes to the weight of the testimony, not to its admissibility. A vital issue was, did appellee in fact understand the offer in controversy to be of a New Century No. 6 for $50? In the determination of this issue it was certainly relevant to show, if appellant could do so, that appellee had theretofore received knowledge of the selling price of a New Century, and of second-hand machines. It was for the jury to say whether such knowledge had been received through any authorized agent, and whether such knowledge existed at the time in question.

Under the real issues involved it is difficult to see what legitimate place in the pleading the anti-trust law had. The suit was for the recovery of specific property, and not for the enforcement of a contract in violation of any of the provisions of that law. However, the value of the typewriter in question was involved, and we will not undertake to say that the court should reject competent evidence, if such existed, of the existence of an agreement or combination by reason of which the market price was fictitious, and not the real market value.

For the errors noted the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v. GEORGE F. MILLER.

Decided March 9, 1901.

1.—Negligence—Railroads—Failure to Inspect Cars.

See evidence held sufficient to show that an injury to a freight conductor, caused by the top round of a ladder on the side of a car giving way, was due to negligence of the company in failing to have the car properly inspected.

2.—Same—Evidence Tending to Show Negligence.

It was competent for plaintiff, suing for injuries that resulted from a failure of defendant to have its cars properly inspected, to show that defendant formerly had car inspectors at the point where the injury occurred, but had none there at the time of the accident, as this tended to prove the want of due care on defendant's part as to the inspection of its cars.

3.—Mental Anguish—Evidence of.

In an action of damages for serious personal injuries, permanent in character, it is competent for plaintiff to testify to his mental suffering in contemplating his changed and crippled condition and reflecting that he must continue to be laid up and suffer the balance of his life, this being a natural result of such injuries.

Appeal from Denton. Tried below before Hon. D. E. Barrett.

T. S. Miller and *Head & Dillard,* for appellant.

Greenlee & Bradley, for appellee.

HUNTER, Associate Justice.—This suit was filed January 30, 1900, to recover of appellant for personal injuries received by appellee at Whitesboro, Texas, on the 18th day of December, 1899, while in the employ of appellant as freight train conductor, by reason of the defective condition of one of its cars and the failure to properly inspect it, whereby the top round of the ladder on the side of said car gave way for want of a nut on the bolt which held it as appellee was climbing on top of said car at night in the performance of his duty, whereby he fell to the ground with his back across the rail of a side track, causing him serious and permanent injuries, as it is alleged, to the extent that he is unable to work, his health destroyed, partial paralysis of his lower limbs from the hips down, and constant suffering from mental anguish and physical pain.

The appellant answered by general denial and special plea of contributory negligence, and that the defect, if any, was patent and obvious and by the use of ordinary care could have been discovered by appellee, and also that the defect, if any, was latent and could not have been discovered by appellant by the use of ordinary care, and that appellee assumed the risk of injury from such cause. The jury found a verdict in favor of appellee for $10,000, and from the judgment rendered thereon this appeal is taken.

The evidence tended to prove, and was sufficient to establish, the material allegations in appellee's petition. It was dark when the accident occurred, and though the evidence tends to establish that the nut from the bolt which held the round of the ladder had slipped off by reason of the threads of the same being worn or battered off, the appellee did not know of the defect, and it was too dark to discover it at the time he was injured. The car had been inspected at Galveston on the 14th of the month, at Houston on the 13th and 16th, at Smithville on the 17th, and the defect was not discovered. The conductor, Graham, and brakemen, Bolin and McDonald, brought the car in their train from Smithville to Hillsboro on the 17th and 18th, and failed to discover the defect. A proper inspection of the ladder at Hillsboro on the 18th, or at Whitesboro, as we infer from the evidence, would have disclosed the defect and avoided the injury. We therefore conclude that the injury was occasioned by the negligence of the appellant in failing to have the car properly inspected and repaired. At the time of his injury the appellee was unacquainted with sickness and suffering, weighed 204 pounds, and was earning $100 per month, but is now a physical wreck and a constant sufferer both physically and mentally.

The first assignment of error complains of the admission of evidence that the appellant had formerly had two car inspectors at Whitesboro, but had none at the time of the accident, because the same was immaterial and irrelevant. We think the court did not err in admitting it,

as it tended to prove the want of ordinary care on the part of appellant to have its cars and trains sufficiently and properly inspected; in fact, that it was derelict in taking away its inspectors at this place, when the condition of this car itself tended to prove the necessity for keeping them there.

The second assignment complains of the court in permitting the plaintiff to testify on the issue as to mental anguish, as follows: "There are times when I am thinking of what I am now and what I have been the prospects are so heavy for me that I can hardly bear the weight. I have been a very active man in my days, and when I think of what I have been, a powerful man, and when I think that I have got to be laid up the balance of my life, the load is a little heavy for me." Appellee's evidence, and that of three or four doctors, describe his condition in detail, and fully justify our conclusion that he is now a physical wreck and a constant sufferer both physically and mentally.

The objection to this evidence as stated in appellant's brief was as follows: "Defendant objected to the question, and to any evidence of mental suffering from contemplating his crippled condition, and requested the court to restrict the testimony to mental anguish growing out of the physical injury to plaintiff, and not contemplating his crippled condition, because such evidence would be immaterial, irrelevant, and too remote."

The third assignment complained of the court's refusal to give a special charge in this language: "If you find in favor of plaintiff, you will not allow him any amount as compensation for any mental anguish or suffering you may believe he has suffered from brooding over or contemplating his maimed or injured condition and regretting the difference, if any, between his present physical condition and what it was before he was injured." Only one proposition is submitted under these two assignments, and that is: "Mental suffering which an injured person experiences from brooding over and regretting his crippled condition is too remote, and not a proper subject for damages in cases of this kind."

We think the court did not err in admitting the evidence, nor in refusing to give the special charge asked. Since mental anguish or suffering is a proper subject for damages in cases where one in good health and strength, sound in mind and members, by reason of the wrongful act of another, is reduced to the state of a physical wreck, maimed and crippled for life, broken in body and spirit; and, since the jury may presume mental anguish in the absence of affirmative evidence thereof in cases where such would be the natural consequence of such injury, we can see no good reason, since parties to the suit may testify, why they may not relate their mental anguish as well as their physical sufferings. And we understand that this mental suffering may be, in part at least, the result of comparing their present wretched, dependent condition and hopeless future, with the bright, happy and independent life of which they were deprived by the injury, as well as the contemplation of the

fact that they must suffer from the effects of such injuries during the balance of their lives. The distinguished counsel for appellant have not favored us with a definition of the kind of mental anguish for which, in their opinion, damages may be given other than as expressed in their requested charge; but we are unable to see why the mental sufferings of this man in contemplating his changed condition from a bright, happy life to a living death should not form one of the natural results of such an injury and a proper subject of evidence and of damages.

All the other assignments of error have been carefully considered by us, and are overruled, and we deem it unecessary to discuss them, as no new question is raised thereby.

Finding no error in the judgment, it is affirmed.

Affirmed.

Writ of error refused.

CLARKE & COURTS v. REEVES COUNTY.

Decided March 16, 1901.

Constitutional Law—Counties—Act Disorganizing and Attaching Not a Local Law.

The Act of 1897 (General Laws 1897, page 205) disorganizing Loving County and attaching it to Reeves County, and providing that the commissioners court of the latter shall audit claims against Loving County and levy and collect taxes on the property in Loving County for their payment, is a general and not a local law within the provision of the Constitution requiring that no local or special law shall be passed unless thirty days' notice of intention to apply for its passage has been first duly published, since the above stated act, though relating to only two counties, deals with the political division of the State, affecting its judicial organization, its taxes, revenues, and school fund.

Appeal from Reeves. Tried below before Hon. W. R. Smith.

Browning & Madden, for appellants.

George Estes and *Edward & Edwards,* for appellee.

HUNTER, ASSOCIATE JUSTICE.—Clarke & Courts filed this suit in the District Court of Reeves County, on the 13th day of September, 1898, against said county, under the provisions of the act of the Twenty-fifth legislature disorganizing Loving County, on county warrants issued by Loving County, aggregating $3369.55, also an account amounting to $99.10 against said county.

The defendant answered by general and special demurrers raising the question of the constitutionality of the act named, as follows:

"Comes now the defendant, Reeves County, and says there is no power in this court to hear and determine plaintiff's cause of action, because the defendant says this suit is instituted under authority attempted to be given in an act of the Legislature of the State of Texas, entitled 'An act

to provide for the disorganization of the County of Loving, in the State the presentation of said claim to the Commissioners Court of Reeves for judicial and other purposes, and to provide for the assessment and collection of taxes in said county, and for the payment of the outstanding indebtedness of said county,' under which act said suit is brought.

"That said act of the Legislature, in so far as it attempts to authorize the presentation of said claim to the Commissioners Court of Reeves County, or to grant said court the power to audit and establish claims against Loving County, and to assess and collect taxes for the payment of said claims, and to require the county treasurer, assessor and collector of Reeves County to give new and additional bonds, and to suspend the statute of limitation in said Loving County, is unconstitutional and void.

"Defendant further shows to the court that this suit is prematurely brought, in this: That said original petition filed herein fails to show that said claims were presented to the Commissioners Court of Loving County, and rejected by said court, and there is no valid law authorizing the presentation of said claim to the Commissioners Court of Reeves County, wherefore defendant prays judgment."

The demurrers were sustained, and the suit dismissed, and appellants bring the cause here for revision. The most important question involved here is whether the act of 1897 (General Laws, chapter 143, page 205) disorganizing Loving County and attaching it to Reeves County for judicial and other purposes named in the act is a general or local law within the meaning of our Constitution.

The preamble and first and second sections of the act are as follows: "Whereas, the county of Loving as it now exists is in a disorganized condition, having no county officials resident within the limit of said county, and no taxes have been assessed and collected in said county for the years 1895 and 1896, and a portion of the taxes assessed for the years 1893 and 1894 remain uncollected; therefore:

"Section 1. Be it enacted by the Legislature of the State of Texas, that said county of Loving be and the same is hereby disorganized, and said county is hereby attached to the county of Reeves for judicial and other purposes, until such time as the said (county) shall resume an organized state.

"Section 2. The County Commissioners Court of Reeves County shall hereafter levy a sufficient annual tax, general and special, upon all property subject to taxation, situated in the county of Loving, to liquidate the indebtedness now existing against said county, which taxes shall be assessed and collected in the manner now provided by law for the assessment and collection of taxes in the unorganized counties of this State; provided, also, that all taxes due the State of Texas and such as may be levied for county purposes as herein provided, upon all property situated in said county, for the present year, and for all previous years during which such taxes have not been paid, shall be assessed and collected by the officers charged by law with such duty, to the same effect as

though Loving County had at all times been an (un)organized county attached to the said county of Reeves."

The act then provides that the assessor and collector of taxes and treasurer of Reeves County shall execute addition bonds to the county judge of said county in the sum of $5000 each, to secure the taxes collected and held by them in and for Loving County, and directs what they shall do with such taxes when so collected and received; provides that the books and public records, papers, accounts, and property of Loving County shall pass into the custody of the officers of Reeves County, and that the county judge shall publish notice to all persons holding claims against Loving County to present them to the Commissioners Court of Reeves County for approval or ejection.

Sections 9, 10, 11, and 12 of said act then provide:

"Sec. 9. That all parties now having any claims against or warrant or bond of indebtedness of Loving County, shall, on or before the 1st day December, 1897, present the claim or indebtedness to the Commissioners Court of Reeves County for rejection or approval, and the Commissioners Court of Reeves County shall pass on all such claims, warrants, bonds, and indebtedness in the same manner and order as if they were the commissioners of Loving County, approving or rejected the same in all respects as claims and debentures are now required to be presented for approval or rejection to commissioners courts.

"Sec. 10. That whenever any claim or indebtedness above named shall have been rejected by the commissioners of Reeves County, the owners thereof may have all legal remedies in Reeves County, as fully as if the claim or indebtedness were against Reeves County, the judgment, order, or decree to be against the assets of Loving County only, and to be paid by the proper funds realized upon the property of Loving County.

"Sec. 11. That all existing indebtedness or claims against Loving County which have not been barred for more than two years after this act shall take effect may be presented to the Commissioners Court of Reeves County on or before the first day of December, 1897, for rejection or approval, and shall be passed upon by said Commissioners Court in all respects as if presented at any time not earlier than two years prior to the time of presentation.

"Sec. 12. That the Commissioners Court of Reeves County, after the aforesaid claims have been filed with and approved by them as above provided, shall classify them as provided by law, and they shall levy a sufficient general and special tax as hereinbefore named, not to exceed the limit allowed by law, for each year, to pay all the indebtedness of each class so registered and approved by them, including the expenses authorized by this act; and where legal bonds have been issued to create a sinking fund, keeping each class and the funds belonging to it separate and distinct from every other fund, and out of each fund to pay the claims against such fund only. Where claims filed with and approved

by the Commissioners Court of Loving County are also filed with and approved by the Commissioners Court of Reeves County, they shall be paid in the order registered by and approved in Loving County; provided, they are filed on or before December 1, 1897; otherwise, they shall be paid in the order registered by and approved by the Reeves County Commissionrs."

This act was passed under the emergency clause of the Constitution, by more than a two-thirds vote in its favor in both house and senate, and became a law May 23, 1897. The emergency, as stated in the act, is as follows: "The fact that there can be no taxes assessed or collected, and no court either criminal or civil held in Loving County under the existing condition of affairs, creates an emergency and an imperative public necessity that the constitutional rule be suspended," etc.

The appellant's petition shows a compliance with this act in every particular, so that, if the act is not prohibited by the Constitution, they are entitled to recover judgment establishing their claim against Loving County and to a decree for its payment out of the taxes collected in said county, as provided in section 10 of said act.

Our Constitution provides: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law * * * creating offices or prescribing powers and duties of officers in counties * * * regulating the practices or jurisdiction of, or changing the rules of evidence in any judicial proceedings or inquiry before courts, * * * and in all other cases where a general law can be made applicable, no local or special law shall be enacted." Art. 3, sec. 56.

"No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the Legislature of said bill, and in the manner provided by law." Art. 3, sec. 57.

Other objectioss are also urged to the act as being violative of the Constitution, but in view of the disposition we shall make of the case, it will not be necessary to discuss them, as we think they are clearly not well taken.

Other objections are also urged to the act as being violative of the and affect only two counties in the State, yet deals with the political division of the State, and with the taxes and revenues of the State, and affects more or less the judicial organization of the State and the State school fund, and incidentally the public school lands of the State, and many other subjects which might be enumerated affecting more or less the interests of the people of the State generally. And where the act operates upon subjects in which the people at large are interested, it is, within the meaning of our Constitution, a general and not a local or special law. Reed v. Rogan, 59 S. W. Rep., 255; Clark v. Finley, 93 Texas, 173; Healey v. Dudley, 5 Lans., 115.

If the act is a general law, then all the other objections urged against it by appellee must fail.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Writ of error refused.

J. M. BUTTERWORTH v. CITY OF HENRIETTA

Decided March 23, 1901.

Municipal Corporation with Waterworks—Negligence—Liability for Injury by Fire.

A municipal corporation undertaking by the establishment of waterworks, or through other means, to prevent the destruction by fire of the property of its inhabitants, is not liable to them for the burning of such property in consequence of its failure, or that of any agency employed by it, to accomplish that result. Lenzen v. City of New Braunsfels, 13 Texas Civil Appeals, 335, not followed.

Appeal from Clay. Tried below before Hon. A. H. Carrigan.

Barrett & Barrett, for appellant.

Allen & Wantand, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—This appeal is from a judgment sustaining a demurrer to the petition to the petition of appellant, wherein he sought to recover of appellee damages in the sum of about $5000, caused by the burning of property belonging to him situated in the town or city of Henrietta.

The petition alleged as a ground of liability that the city of Henrietta owned and operated a system of waterworks "purchased and erected by means of taxation on the property situated" therein, and maintained by "tolls and rents" charged the inhabitants for the use of water. That this was done for the "city's advantage and profit;" that appellant "was a patron of said waterworks, paying the usual and customary rates, and was a taxpayer of said city;" and that said city, by reason of the facts so alleged, "assumed the duty and became bound to supply its public with water" for the general purposes for which water was used and for the extinguishment of fires. The petition further alleged a negligent and willful failure on the part of the city to furnish the water necessary to extinguished the fire which destroyed his property, and that if this duty had been discharged the fire would have been extinguished.

Evidently the pleader undertook to make a case parallel to that of Lenzen v. City of New Braunfels, 13 Texas Civil Appeals, 335, decided by the Court of Civil Appeals for the the Third District, and which is mainly relied on here to support the contention that the court erred in sustaining the demurrer to the petition. The question discussed with so

much learning and ability in the opinion of Chief Justice Fisher in that case is one which has time and again been considered by courts of the highest authority, and we do not feel inclined, therefore, to again reproduce what has been so often said upon it. We deem it sufficient to state that we understand the decisions to hold, some upon one ground and some upon another, that a municipal corporation undertaking by the establishment of waterworks, or through other means, to prevent the destruction by fire of the property of its inhabitants, is not liable to them for the burning of such property in consequence of a failure of such municipality, or any agency employed by it, to accomplish that result. House v. Waterworks Co., 88 Texas, 233; Shanework v. City of Fort Worth, 11 Texas Civ. App., 271, and authorities cited in these two cases.

The judgment is therefore affirmed.

Affirmed.

Writ of error refused by the Supreme Court.

WILLIAM BARNES v. SAMUEL ZETTLEMOYER.

Decided March 23, 1901.

1.—Negligence—Injury to Adjoining Property—Storage of Dynamite—Evidence of Custom.

Where plaintiff sues for injury to his storehouse caused by an explosion of from thirty-five to forty-five pounds of dynamite kept by defendant, a hardware merchant, in an adjoining building, it was error to exclude evidence as to the general custom and usage in regard to keeping dynamite in hardware stores, and the amount ordinarily kept, the issue being as to want of due care; but evidence as to how particular persons conducted their hardware business in this respect was not competent.

2.—Same—Reasonable Use of Property.

The interests of another will not deprive the owner of property of its ordinary and reasonable use. and to create liability for injury resulting from such use negligence must be shown.

3.—Dynamite—Keeping Stored—Nuisance.

See evidence as to the explosive character of dynamite upon which the court declines to hold that the keeping of thirty-five to forty-five pounds of it by hardware merchants is, in itself. a nuisance, as being a constant menace to property in that vicinity.

Appeal from Comanche. Tried below before Hon. N. R. Lindsey.

Wilkinson & Reid, for appellant

G. H. Goodson and *J. W. Boynton,* for appellee.

STEPHENS, ASSOCIATE JUSTICE.—The parties to this controversy owned adjacent lots in the town of Comanche, upon each of which was a one-story stone building, used by its owner as a place of business. Appellant's house was destroyed by fire, and appellee's was injured at the

same time by an explosion in that of appellant. This action for damages was consequently brought by appellee against appellant, and resulted in a verdict and judgment in his favor for $500, from which this appeal is taken. The ground of liability was thus stated in appellee's petition: "That on the night of December 31, 1899, the defendant then carelessly and negligently had in his house a great quantity of dynamite, to wit, between about thirty-five and forty-five pounds, and at and theretofore kept and had kept said dynamite in one lot in a box, open and uncovered, in the front part of defendant's store underneath a counter, with heavy counters and shelving above and immediately around and adjacent to it loaded down with heavy articles of hardware; and at the same time and place kept, and had kept, in his said building, in very close proximity to said dynamite, large quantities of gunpowder, gun and pistol cartridges, and other explosive matters, and under circumstances that it was then and there apparent to the said Barnes, and was then and there apparent to any person of ordinary care and prudence in the handling and keeping of said explosives, that in the event said explosives should explode, the same would be dangerous and destructive to property adjoining thereto, and especially that it would destroy plaintiff's said house. * * * And that its said injury and destruction was directly and proximately caused by the carelessness and negligence of the defendant in having and keeping in his said store building, in the manner before stated, said dynamite and other explosives, and in his carelessness and negligence in the manner in which he kept and handled said explosives therein, to wit, in handling, keeping, and permitting them to be in such near proximity to each other that said explosives became and were the active agents in the explosion of said dynamite, and the active agents in aiding and adding to the force and effect dynamite explosion; and, unless in the manner above stated, by such carelessness and negligence of the defendant, plaintiff's house would not have been injured."

The court submitted the issue to the jury in its twofold aspect, as thus alleged, of liability both on account of the quantity of dynamite kept and on account of the manner in which it was kept.

To meet the issue as to the quantity of dynamite kept, appellant offered to prove by F. M. McDermott, as stated in his brief, "that the witness had had a number of years' experience in the hardware business, and in the handling of dynamite in connection therewith, in the town of Comanche, Texas, and was acquainted with the custom and usage of well appointed and well conducted hardware establishments and concerns, both in the town of Comanche and generally, as to the amount of dynamite kept in stock and on hand by them, and their manner of handling same in the conduct of their business; that the keeping in stock and handling of dynamite is a part of the hardware business; and that it is the custom and usage of well-appointed and well-conducted hardware establishments and concerns in this section of the country, and generally throughout the country, to carry in stock as much as fifty pounds of dynamite of the kind carried by defendant at the time of said fire."

This testimony, as well as that of other witnesses as to how they did business in Comanche, was excluded as incompetent, and to this ruling error is assigned upon the ground that, as stated in the proposition submitted under the assignment, "the question being as to whether or not there was a want of due care on the part of appellant in this case, evidence of usage and custom was admissible to show what constituted due care as applied to said particular case."

The authorities cited in support of this proposition seem to sanction the admissibility of such testimony. Railway v. Cowser, 57 Texas, 303; Railway v. Harriett, 80 Texas, 81; 27 Am. and Eng. Enc. of Law, p. 902, and cases there cited; Oil Co. v. Swan (Tenn.), 14 S. W. Rep., 928. In the last case cited, which was somewhat analogous to the one at bar, the following language was used by the Supreme Court of Tennessee: "The evidence, to be competent, must amount to something going to establish a custom in the business under investigation." The evidence offered as to how a particular person did business in that case was held to be inadmissible, the ground of objection being that, while it might be shown how a given business is conducted in general, it was incompetent to show how any particular person or concern does business. Tested by this rule, which we understand to be the correct one, the testimony of McDermott, if material in this case, should have been admitted, but that of other witnesses as to how particular persons in Comanche conducted the hardware business, which was the kind of business appellant was engaged in, was properly excluded. See Lawson on Usage and Custom, page 318, section 168, as to the admissibility and effect of usage and custom as evidence.

The materiality of the testimony of McDermott, however, is strenuously denied by counsel for appellee, upon the ground that the quantity of dynamite kept by appellant made the act of keeping it a nuisance; the contention being that if a person keeps on hand such a quantity of dynamite as would by explosion destroy the property or lives of others, he does so at his peril, negligence or no negligence, in support of which the case of Bradford Glycerin Company v. St. Mary's Woolen Manufacturing Company, 54 Northeastern Reporter, 528, is cited. What was decided by the Supreme Court of Ohio in that case is thus stated in the syllabus by the court: "Nitroglycerin is a substance usually recognized as highly explosive and dangerous, the storage of which at any place is a constant menace to the property in that vicinity. And one who stores it on his own premises is liable for injuries caused to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage nor is chargeable with negligence contributory to the explosion." The formula so often quoted from the opinion in the familiar English case of Fletcher v. Rylands was made the basis of that decision, but as appears from cases cited in the opinion of the Ohio court, this formula is by no means of recognized authority in America. Indeed, the weight of authority in this country, including our own Supreme Court, seems opposed to its unqualified acceptance. See opinion

of Justice Williams in Railway v. Oakes, 58 S. W. Rep., 999. But if the Ohio decision be accepted as good authority, as it perhaps should be, when applied to a similar case, we are yet of opinion that it may be distinguished from the case before us. Dynamite is much less liable to explode than pure nitroglycerin, and for that reason has come into general use as an article of commerce, the explosive power of the nitroglycerin entering into its composition being greatly modified by the other and larger constituent—infusorial earth or other absorbent. The testimony in this case was quite conflicting as to the danger to be apprehended from the storage of dynamite such as appellant handled. For instance, one witness testifying as an expert, who was to some extent corroborated by another, though contradicted by still another, stated in substance: "That dynamite can not be exploded by fire; that it burns up; that it takes concussion to explode it, and that in practical use it is exploded by means of a cap; that it might also perhaps be exploded by striking it on a hard surface with a hammer, though he had never seen it done; that in his opinion the explosion of gunpowder or other substance near it could not cause it to explode, unless the substance exploded was in actual contact with it; that he knew this from the fact that a stick or more of it exploded in a hole of rock or earth will not explode other sticks in holes a few inches distant; that if any quantity of it should be exploded under a board suspended a few inches above it that the board would not be moved; that unless something is in contact with it above, it operates downward; that if twenty-five or forty pounds had exploded under the circumstances mentioned in this case, it would have left a large excavation in the ground [which was not done in this instance], and would not have affected the roof; that if no such excavation as made, he would say that the dynamite was consumed, and did not explode; that he thought fifteen pounds of gunpowder situated under a base shelf, and about jam with it, with heavy shelving and hardware above, would be sufficient to drive some of said shelving and hardware through the roof, and blow away a part of the roof."

We would have to ignore such testimony as this to hold that the quantity of dynamite kept by appellant was such as to render its storage, as was held in the Ohio case with reference to nitroglycerin, "a constant menace to the property in that vicinity," and this we would not be warranted in doing. It was for the jury to say from the testimony whether or not, owing to the quantity stored or the circumstances under which it was stored, it was, as alleged by appellee, "then and there apparent to any person of ordinary care and prudence in the handling and keeping of said explosives, * * * that the same would be dangerous and destructive to property adjoining thereto." The prevailing rule in this country is that the interests of another will not deprive the owner of property of its ordinary and reasonable use, and that to create liability for injury resulting from such use negligence must be shown. As a circumstance, therefore, to be considered by the jury in determining whether or not appellant was using his property in the ordinary manner

and as a person of ordinary prudence and care would do, it was competent for him to show the usage of the business in which he was engaged.

For the error in excluding such testimony, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

HATTIE C. ROBERTSON v. A. H. KIRBY ET AL.

Decided March 23, 1901.

1.—Verdict—Special Issues—Conclusiveness.

Where a case is submitted to the jury on special issues, and no complaint is made in motion for new trial or otherwise in the court below of the verdict, it becomes, under the statute, conclusive as to the facts found. Rev. Stats., art. 1332.

2.—Finding of Fact by Court.

That a finding of fact by the trial court is copied into the transcript among the conclusions of law does not deprive it of its character as a finding of fact and its right to be so accepted.

3.—Trespass to Try Title—Prior Possession Insufficient, When.

Plaintiff in trespass to try title, seeking to eject mere intruders, and having failed to show title in himself, can not recover on the strength of a prior possession where the evidence affirmatively shows that such possession was under and by virtue of an unfounded and mistaken claim of title, since the prima facie inference of ownership arising from the possession is rebutted, and no presumption arises that an independent outstanding title had been acquired.

Error from Taylor. Tried below before Hon. N. R. Lindsey.

Felix H. Robertson and *L. W. Campbell,* for plaintiff in error.

J. M. Wagstaff, Kirby & Kirby, and *Theodore Mack,* for defendants in error.

STEPHENS, ASSOCIATE JUDGE.—This writ of error is prosecuted from a judgment denying Hattie C. Robertson recovery of a tract of land situated in Jones County. She sought to eject defendants in error, who were mere intruders, by showing prior possession of the land, and a chain of title from the patentee, Henry B. Williams. The case was submitted to the jury on special issues, and as no complaint was made in motion for new trial or otherwise in the court below of the verdict, it becomes conclusive as to the facts found. Rev. Stats., art. 1332.

In response to the first and second special issues submitted the jury found that the Henry B. Williams to whom the land was granted was not the Henry B. Williams under whom plaintiff in error claimed, thus establishing that she had no title to the land sued for. There is no room for difference of opinion as to the meaning of this verdict, for upon the second issue it contains an express finding that the certificate sold by

the administrator of the estate of Henry B. Williams, deceased, the sale under which plaintiff in error claimed, was not the certificate located on the land in controversy, which, according to the verdict upon the first issue, had been granted to a different Henry B. Williams. The case, then, is not one of mere failure to trace the title back to the sovereignty of the soil, but one in which it is established that the plaintiff in an action for trespass to try title is without title to the land sued for. That is to say, the verdict establishes conclusively (1) that the certificate laid on the land in controversy never belonged to the estate of Henry B. Williams, deceased, but was the property of a different Henry B. Williams; and (2) that it was not the certificate sold by the administrator of that estate.

The court found, of which no complaint is made, and which there was evidence to sustain, that the prior possession relied upon by plaintiff in error was taken and held under the title arising from the administrator's sale. We must accept this finding also. Rev. Stats., art. 1331. True, it is found in the transcript among the conclusions of law filed by his honor, the trial judge, but it is in reality a finding of fact, and the judgment recites that it was entered upon the "verdict of the jury and the facts found by the court."

The question of law to be determined then is, was the presumption of title arsing from prior possession rebutted by the facts above stated? The learned district judge held that it was, and we are constrained to adopt the same view. The case is distinguishable, we think, from House v. Reavis, 89 Texas, 626; Watkins v. Smith, 91 Texas, 589, and that line of cases, and seems more analogous to Bates v. Bacon, 66 Texas, 348. Suits to recover land by showing prior possession and title out of the State have been treated by our Supreme Court as analogous to those in which proof of superior title under a common source is relied on. In Ferguson v. Ricketts, 93 Texas, 565, which was of the latter class, it was held that recovery might be defeated by showing that the original grantee who made a deed to the common source had made a previous conveyance to another, as that was held to rebut the presumption of title in the common source, though it was not otherwise or conclusively shown that the common source had not acquired this title. In the course of the opinion it is said: "No presumption arises that the common source has acquired an independent outstanding title." The case was distinguished from Rice v. Railway, 87 Texas, 90, "in which the title of the common source was not derived directly from the original grantee." By analogy the same distinction may be made between House v. Reavis and this case. Since the title under which possession was taken by the grantor of plaintiff in error was fully exhibited, and was affirmatively shown, as found by the jury, not to be a title to the land in controversy, the evidence of title which possession unexplained affords was rebutted, and no presumption arose that "an independent outstanding title" had been acquired. As was said by Chief Justice Gaines, in Watkins v. Smith, supra, of the effect of possession as evidence of title: "It is not a rule of property.

It is a mere rule of evidence, and is founded upon the principle that, since ownership is a usual concomitant of possession, it is a reasonable prima facie inference that the possessor of property is the owner of such property."

Upon the findings of fact found in the record the judgment is affirmed.

Affirmed.

Writ of error refused.

C. L. MOODY v. J. M. HAHN.

Decided March 30, 1901.

1.—Assignment of Error.

An assignmen of error to the sufficiency of the evidence to support the verdict may be denied consideration on account of the too general statement in the motion for new trial, that the finding complained of "was contrary to the evidence and unsupported by the evidence."

2.—State School Land—Actual Settlement—Mistake as to Tract.

See the opinion for evidence held sufficient to warrant a finding that one who had purchased school land as an actual settler thereon had duly established his residence in a certain dugout in the belief that it was on the tract, and that this belief was well founded—although the evidence strongly tended to show that it was in fact across the line on an adjoining tract.

3.—New Trial—Bias of Juror—Conflict of Evidence.

Where on a motion for new trial on account of bias of certain jurors, the evidence was conflicting, the trial court's action in denying the motion will not be reviewed.

Appeal from Stonewall. Tried below before Hon. P. D. Sanders.

S. W. Scott, A. C. Foster, and *Theodore Mack,* for appellant.

Kirby & Kirby, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—The appellee brought this suit against appellant to recover the south half of section 216, public school lands, situated in Stonewall County, claiming under transfer from J. T. Craft, the original purchaser from the State, the date of this transfer being January 16, 1900, and of the original purchase, September 16, 1897. Appellant made two applications to purchase, one dated November 27, 1899, and the other February 10, 1900, both of which were rejected on account of the previous sale to Craft. The right of appellee to recover was made to depend upon whether or not Craft became an actual settler upon section 216 within six months from the date of his application to purchase, September 16, 1897. In response to special issues submitted to the jury, a verdict was returned in favor of appellee, the jury finding: (1) That Craft actually settled upon section 216 within six months from the date of his purchase, with the intention of

making the land his home, and that such actual settlement continued to the date of his transfer to appellee; (2) that the dugout in which he lived, known as the J. J. Craft dugout, was on section 216; (3) that J. T. Craft established his residence at this dugout within six months after the date of his purchase in the belief that it was on section 216, and that this belief was well founded. Other issues were covered by the jury which need not be noticed.

Complaint was made of the verdict in the motion for new trial, and is renewed in the assignments of error, upon the ground that it was contrary to and unsupported by the evidence in finding that the dugout in which J. T. Craft made his settlement was on the land in controversy, the contention being that the proof showed it to be just across the line on section 120. There was evidence that one surveyor had run one line which placed the dugout on the section in question, but it was also shown that he had run other lines which placed it on section 120, and he was not introduced as a witness; nor was any other testimony offered to show which of the lines run by him was the correct line. On the contrary, another surveyor was introduced, who had traced the line between the two sections, whose testimony left little room for doubt that the dugout was on 120, and not on 216. But we would perhaps have to overrule this assignment on account of the too general statement in the motion for new trial that the finding "was contrary to the evidence and unsupported by the evidence." Clark v. Pearce, 80 Texas, 150; Degener v. O'Leary, 85 Texas, 171; Suggs v. Terry, 34 S. W. Rep., 354; Railway v. Osborne, 26 S. W. Rep., 274.

The finding that J. T. Craft established his residence in the dugout in the well-founded belief that it was on the land in controversy is also complained of, but we think the evidence warranted this finding, which is sufficient to support the judgment. Chancy v. State, 84 Texas, 538; White v. Hall, recently decided by Supreme Court, 61 S. W. Rep., 385.

As to the bias of two of the jurors, the evidence was conflicting, and we would not, therefore, be warranted in holding that the court erred in refusing a new trial upon this ground.

Assignments all overruled and judgment affirmed.

Affirmed.

THIRD DISTRICT, 1901.

JAMES C. FRAZIER v. WACO BUILDING ASSOCIATION.

Decided March 6, 1901.

1.—Evidence—Trespass to Try Title—Abstract—Execution—Variance.

It was not a variance that an alias execution offered in evidence was described in plaintiff's abstract of title as "an execution."

2.—Execution—Levy—Description—Latent Ambiguity.

A description of property levied on, in the return of an execution, as lots 1, etc., "in block 7 of East Waco, situated on the northwest side of Elm street," etc., was sufficient to admit parol evidence to identify it, though there appeared to be other lots and blocks in East Waco bearing the same numbers and lying in a northwest direction from Elm street, but not on such street.

3.—Same—Sheriff's Deed—Description—Parol Evidence.

Parol evidence is admissible to remove a latent ambiguity in the description of the land conveyed in a sheriff's deed, as in case of other conveyances.

4.—Description of Land—Petition—Variance.

It does not create a variance that the description of land sued for in the petition contains particulars not embraced in that given by the instruments offered in evidence.

5.—Trespass to Try Title—Common Source.

A plaintiff deraigning title from the defendant through a sheriff's sale was not bound to go back of defendant in his proof of title.

6.—Franchise Tax—Right of Corporation to Sue—How Questioned.

The question of want of right of a plaintiff corporation to sue because of failure to pay its franchise tax can not be raised for the first time on motion for new trial.

Appeal from McLennan, Nineteenth District. Tried below before Hon. Marshall Surratt.

James I. Moore, for appellant.

L. W. Campbell, for appellee.

FISHER, CHIEF JUSTICE.—The appellee, Waco Building Association, who was the plaintiff below, filed its suit in the usual form of trespass to try title against appellant and several other defendants, on the 29th day of June, 1899, and on November 24, 1899, filed its first amended original petition, pleading specially its title to the land in controversy, on which trial was had, and in which appellee alleged that it was a corporation duly incorporated under the laws of the State of Texas, with its office and place of business in Waco, McLennan County, Texas. That on the 14th day of May, 1897, it recovered a judgment

in cause No. 5726, in the Nineteenth District Court of McLennan County, Texas, against James C. Frazier and other defendants in said suit, for a large sum of money, which judgment was still unsatisfied and unpaid. That on May 15th it caused an abstract of said judgment to be made out, filed, and recorded, and indexed in the judgment records of McLennan County, Texas, alleging and claiming a judgment lien on the land sued for. That afterwards, on July 5, 1897, it caused to be issued on said judgment an alias execution, which alias execution was delivered to the sheriff of McLennan County, Texas, and by him on same day was levied upon a number of pieces of real estate, among others being the following, which was levied upon as the property of the defendant James C. Frazier: "Lots Nos. one (1), two (2), three (3), four (4), and five (5), in Block No seven (7), situated in East Waco, McLennan County, Texas, on the northwest side of Elm street, in what is known as Renick's addition to the city of Waco and sometimes called the Railroad addition to the city of Waco." That pursuant to said levy sale was made of said lots, and the same were bid in by appellee and deed executed to it therefor, which deed was dated October 4, 1897, and acknowledged November 5, 1897, and was duly recorded in the deed records of McLennan County, Texas. That on November 10, 1897, it caused to be issued on said judgment another alias execution, which was, on November 24, 1897, levied upon the same property described above. That the reasonable rental value of said property was $100 per month, and that appellant had been receiving the rents since the date of its deed; and referred to and made a part of its amended petition the abstract of title previously filed in the cause and prayed for judgment for the restitution of the premises sued for and for rents and cost. And in the event it should be held not to be entitled to restitution of the premises, it prayed for foreclosure of its judgment and execution lien and for general relief. (On the trial of the cause appellee relied entirely upon its title and abandoned its prayer for foreclosure of its judgment and execution lien.)

The defendants other than Frazier disclaimed all interest in the premises sued for and were allowed judgment against appellee for their costs, and do not, therefore, join in this appeal.

Defendant James C. Frazier, on February 1, 1900, filed his first amended original answer, setting up (1) general demurrer, (2) plea of not guilty, and (3) set up and claimed the premises sued for as his homestead, alleging his former occupancy of the premises as a homestead with his family; that he claimed the same as a homestead; that he had no other homestead then; that he had never procured any other homestead; that he never left the premises sued for with the intention of abandoning them as a homestead; and that he had never abandoned said premises and that he still claimed the same as a homestead, and prayed for a decree of court declaring the premises sued for to be his homestead and to be exempt from sale under the judgment of appellee, and that the sale heretofore made of the premises be set aside and the deed

made to appellee be canceled and annulled and the cloud upon appellant's title cast by said sale and deed be removed.

On the issues thus formed, on May 28, 1900, the cause went to trial before a jury, and resulted in a verdict and judgment for appellee for the land sued for under a peremptory charge of the court.

We find the following facts: Plaintiff introduced and read in evidence a certified copy of a judgment of the Nineteenth District Court of McLennan County, Texas, rendered on the 14th day of May, 1897, in cause No. 5726, entitled Waco Building Association v. James I. Moore et al. The other defendants in said cause being Thomas Moore, John Moore, T. P. Moore, Luke Moore, Bart Moore, and defendant James C. Frazier, said judgment against the defendants James I. Moore, Thomas Moore, T. P. Moore, Luke Moore, Bart Moore, and J. C. Frazier for the sum of $17,002.72, and against James I. Moore, John Moore, Tom P. Moore, Luke Moore, Bart Moore, and James C. Frazier for $14,610.18, and against James I. Moore, John Moore, T. P. Moore, Luke Moore, and Bart Moore for $3979.52; all said sums bearing interest from date at 6 per cent per annum, which judgment is recorded in volume U, on pages 289, et seq., one of the minute books of said Nineteenth District Court.

2. An alias execution based on said judgment dated July 5, 1897, issued by the clerk of this court, with the return of the sheriff indorsed thereon, showing it came to his hands on the 5th day of July, 1897, and was on same day levied upon certain property described in said return; among the list of the property thus set out and described is the following, which said return shows to have been levied upon as the property of defendant Jas. C. Frazier, to wit: "Lots 1, 2, 3, 4, and 5 in block 7, of the plat of East Waco, situated on the N. W. side of Elm street in said East Waco, McLennan County, Texas," said alias execution being further indorsed showing the property above described to have been advertised according to law for the time and in the manner required for such sales, and the sale of the same at the courthouse door in Waco, McLennan County, Texas, on Tuesday, the 4th day of October, 1897, when the same was struck off to the Waco Building Association, the plaintiff in this cause, for the sum of $1900; and said alias execution was returned so indorsed and unsatisfied as to the remainder due thereon, said return being signed "J. W. Baker, sheriff McLennan County, Texas, by J. H. Lockwood, deputy."

3. An affidavit of L. W. Campbell, attorney for plaintiff, setting up the loss of the original deed made to plaintiff by J. W. Baker, sheriff of McLennan County, Texas, dated October 4, 1897, said affidavit being dated December 1, 1899, and filed among the papers of this cause on the 2d day of December, 1899.

4. An abstract of the judgment of the Nineteenth District Court of McLennan County, Texas, in cause No. 5726, styled Waco Building Association v. James I. Moore et al., being the judgment first introduced in evidence by the plaintiff in this cause, showing same to have been filed

with the clerk of the County Court of McLennan County, Texas, on the 15th day of May, 1897, and recorded and indexed in the judgment records of said county on same date in volume 5, on pages 28 and 29 of said record.

5. Certified copy of deed from J. W. Baker, sheriff of McLennan County, Texas, to plaintiff, dated October 4, 1897, and filed for record in the clerk's office of McLennan County, Texas, on the 6th day of November, 1897, and recorded in volume 119, on page 394, one of the deed records of McLennan County, Texas, which deed purported to convey to plaintiffs the following described property as the property of the defendant James C. Frazier, to wit: "Lots 1, 2, 3, 4, and 5 in block 7, on the plat of East Waco, situated on the N. W. side of Elm street, in said East Waco, in McLennan County, Texas."

We also find that the appellant James C. Frazier was at the time of the levy of the writ of execution and the sale thereunder, the owner of lots 1, 2, 3, 4, and 5 in block 7 on the plat of East Waco, which block was situated on the northwest side of Elm street, as shown by the plat and map of East Waco; and we find from the evidence of the appellant Frazier, in connection with the description given in the instruments above set out that the above described property is the property in controversy, and was the property levied upon and sold and conveyed by the sheriff's deed.

We also find that the property was not at the time the homestead of appellant Frazier; but his homestead was at the time of the levy and sale situated in Bosque County, Texas.

There is no merit in appellant's first assignment of error, which is as follows: "The court erred in permitting plaintiff to introduce and read in evidence the certified copy of the alias execution in the case of the Waco Building Association v. James I. Moore et al., because the instrument offered in evidence is not described in the abstract of title filed by plaintiff in this cause, in this: the abstract refers to a certified copy of an execution, etc., while the instrument read in evidence is a certified copy of an alias execution, and not an original execution."

There is no variance between the instrument described in the abstract of title and that offered in evidence. The abstract of title calls for a copy of an execution; the instrument offered in evidence, which was objected to, is a copy of an alias execution. The abstract did not state that the plaintiff relied upon an original execution, but used the expression "copy of an execution." An alias execution is undoubtedly an execution, although it may not have been the first that was issued.

The appellant objected to the evidence of title offered by appellee, because the property was not sufficiently described in the return indorsed upon the execution and in the sheriff's deed; and in this connection contends that the parol evidence of the appellant Frazier, elicited by appellee upon his cross-examinaion, was not admissible for the purpose of aiding the description or of identifying the land in controversy. The description given in the return of the officer indorsed upon the execu-

tion and in the deed executed by him is not so uncertain that it could not be given application. It describes and conveys lots 1, 2, 3, 4, and 5 in block 7 of East Waco, situated on the northwest side of Elm street in East Waco, in McLennan County, Texas. This may be a good description; but it is contended by appellant that it is uncertain for the reason that the plat of East Waco shows that there are other blocks and lots of the same number in East Waco in a northwest direction from Elm street, but there is no block No. 7 on the northwest side of Elm street. The block called for in the description given must lie along the side of Elm street. The testimony of Frazier upon his direct examination is to the effect that the map of East Waco shows that there are other blocks in a northwest direction from Elm street; but there are none but block 7, which he owned and claimed, situated on the side of Elm street. This witness in effect, upon cross-examination, testified that the land described in the instruments of title offered by the plaintiff was the lots in controversy, and were the only lots that he owned on the northwest side of Elm street in East Waco. This portion of his evidence was objected to by the appellant. If there is ambiguity in the description it is not patent, but arises only when the attempt is made to apply it to the lots in controversy. An ambiguity of this character, in other words, one that is latent, can, as in transactions between individuals, be explained or removed by extrinsic evidence. But there are decisions to the effect that a resort to such evidence is not permissible to aid a description in a sheriff's deed. There never have been any solid reasons given why such a distinction should have ever been recognized; and wisely, we think, the tendency of the recent decisions of the Supreme Court of this State is to ignore any such distinction and to recognize the right to invoke the aid of parol evidence in order to identify the land described. Wilson v. Smith, 50 Texas, 365; Hermann v. Likens, 90 Texas, 448; Pierson v. Sanger Bros., 93 Texas, 163.

In disposing of the third assignment of error, it is only necessary to state that we do not think there was any variance between the description of the land described in the plaintiff's petition and that in the instruments of title upon which it relied. The description given in the petition complained of was simply an additional description, but did not tend to vary that stated in the instruments of title offered by the plaintiff.

We do not understand the law to be as contended for in appellant's fourth assignment of error. The appellee was not required to extend its title back beyond Frazier, the judgment debtor, and connect him with the sovereignty of the soil.

The court was correct in the peremptory instruction given to return a verdict in favor of the appellee. The evidence beyond controversy clearly shows that the appellant had no homestead interest in the property in controversy, but his homestead was at the time of the levy and sale and for many years prior thereto, in Bosque County, Texas; and as to the question of description, there was really no issue of fact raised

concerning it. The description given in the instruments relied upon by the plaintiff, together with the only parol evidence bearing upon that question in the record, that is, the testimony of the appellant himself, clearly and unmistakably establishes the fact that the lots described were those that were conveyed by the sheriff's deed to the appellee.

There was no error in the court's overruling the amended motion for a new trial on the grounds claimed in appellant's eighth assignment of error. The right of the appellee to bring and maintain the suit because it had not paid its franchise tax should have been raised before judgment, and came too late when first presented by the motion for a new trial. Further, we are also of the opinion that the subsequent payment of the tax related back and revived whatever rights the appellant had at the time the suit was instituted.

We find no error in the record, and the judgment is affirmed.

Affirmed.

Writ of error refused.

W. J. LEE v. BRITISH AND AMERICAN MORTGAGE COMPANY.

Decided March 6, 1901.

1.—Trust Deed—Foreclosure—Limitation—Election of Remedies.

The holder of a mortgage with power of sale who by ruling on demurrer has been denied foreclosure on the ground that the debt was barred, is not deprived, by his election to foreclose, of his right to proceed by trustee's sale, since he had but one remedy, and no choice; he may still sell through the trustee and by amendment assert title through such sale.

2.—Same—Costs.

On the recovery of judgment by plaintiff in such amended action it was not error to charge defendant with one-half the costs incurred prior to the amendment.

3.—Homestead—Incumbrance by Surviving Husband—Rights of Minor Children.

Children having no homestead rights as such in the home of their father after the mother's death, such surviving husband can create a valid incumbrance upon his interest in the homestead, and one acquiring title by sale to satisfy such incumbrance is entitled to partition, as against the children inheriting their mother's interest and the surviving husband asserting homestead rights for them and himself.

4.—Same—Dispossession—Rents.

Against one wrongfully dispossessing them of the land, but afterwards acquiring the father's interest by such sale to satisfy an incumbrance, no recovery for rents could be had thereafter except to the extent of the children's half interest inherited from their mother.

Appeal from Brown. Tried below before Hon. J. O. Woodward.

T. C. Wilkinson, for appellant.

G. N. Harrison, for appellee.

FISHER, CHIEF JUSTICE.—On May 7, 1900, appellee filed its second amended original petition, upon which trial was had. It alleged substantially that on February 11, 1890, appellant executed and delivered to Albert R. Shattuck, trustee, a certain deed of trust upon the tracts of land in controversy in this suit for the purpose of securing the payment of certain indebtedness evidenced by notes due Albert L. Richardson, and which notes on October 14, 1892, became the property of appellee; that default having been made in the payment of said indebtedness, the substitute trustee, on May 2, 1899, sold said land under the power given in said deed of trust, at which sale appellee became the purchaser and received a deed to same from said trustee; that about the 2d day of May, 1899, appellant entered upon said lands and ejected appellee therefrom, and still unlawfully withholds the same from appellee, converting the rents, profits, revenues, etc. Appellee prayed for judgment for the title to and possession of said lands.

Appellant filed his first amended original answer on December 7, 1897, in which, among other things, he claimed homestead rights in the 160-acre tract. On the same day the interveners, Clara Pearl Lee and Emma Cuma Lee, filed their third amended answer, in which they allege, among other things, that they are the children of appellant, W. J. Lee, and as the heirs of their mother, who was dead at the time of the execution of said deed of trust, are the owners in fee simple of one-half of the property in controversy, same being the community property of said W. J. Lee and wife.

Appellee filed its third supplemental petition on May 7, 1900, in which it denied the allegations contained in the pleadings of appellant and interveners, pleaded abandonment of homestead, if any, and alleged among other things, that said 160-acre tract of land was incumbered by a valid lien fixed upon it before it acquired its homestead character, and that the money obtained by virtue of said deed of trust was intended to be used and was used in paying off and discharging said lien, and that therefore appellee was subrogated to the rights of said original lienholder.

On July 7, 1900, the appellant, W. J. Lee, filed his first amended supplemental answer in reply to plaintiff's said second amended original petition, which supplemental answer consisted of a general denial, and the following special plea, viz: "That on the 4th day of November, A. D. 1892, the plaintiff herein, who claimed to be the owner of the land in controversy by conveyance from one Albert L. Richardson, instituted suit in this court against this defendant in the ordinary form of trespass to try title for the recovery of said land; that on the trial of said cause at the December term, 1894, of this court, judgment was rendered against the plaintiff; that plaintiff obtained a new trial at said December term of court, and by his second supplemental petition, filed May 24, 1895, for the first time declared upon the note and deed of trust described in plaintiff's said second amended original petition and asked a judgment upon said note and a foreclosure of the lien contained in

said deed of trust, in the event the court held it had no title to the land in controversy; that at a subsequent term of this court this defendant excepted to the setting up of said cause of action by supplemental petition, which exception was by the court sustained; that thereupon the plaintiff by first amended original petition filed December 6, 1897, by one count of said petition sought the recovery of said land in the form of trespass to try title, and by a second count declared upon said note and deed of trust and prayed that in the event it was refused the recovery of said land that it have judgment on said note and a foreclosure of said deed of trust, etc.; that at the January term, 1899, of this court, this defendant excepted to said second count of plaintiff's said first amended original petition in which it sought a recovery upon said note with a foreclosure of said deed of trust upon the ground that said cause of action was barred by the statute of four years limitation, which exception was by the court sustained, and said cause was continued till the next term of court; that afterwards, to wit, on the 22d day of May, 1899, this plaintiff, claiming to be the owner and holder of said note and deed of trust, acting through one O. R. Sholars, substitute trustee, sold said property at public outcry under the power contained in said deed of trust, and at the sale became the purchaser of said property, and received a deed to same from said O. R. Sholars; that at the time of said sale under said deed of trust, at which the plaintiff herein became the purchaser, as aforesaid, this suit was still pending in this court and undisposed of, the judgment sustaining said exception on account of the bar of the statute of limitations was in full force, and that this plaintiff is now relying solely upon said deed received from O. R. Sholars, trustee as aforesaid, for a recovery of said land, as is shown by its said second amended original petition.

"Wherefore, this defendant says that the plaintiff having elected to sue upon said note and ask a foreclosure of said mortgage or deed of trust, and said issue having been decided against it and said remedy having been exhausted, was thereupon and is now estopped and debarred from relying upon any title or alleged rights derived by a sale of the property in controversy under the power contained in said deed of trust, and of this he prays judgment of the court."

On July 17, 1900, plaintiff filed its fourth supplemental petition, containing a general demurrer to defendant's said first supplemental answer, set out above and a general denial. The court sustained said general demurrer to which action the defendant, W. J. Lee, then and there excepted.

The court in a trial on the merits gave judgment for the plaintiff for the 320-acre tract of land in controversy, and for one-half of the 160-acre tract, the other half thereof being adjudged to the interveners as the community interest of their mother; and also provided that no writ of possession should issue for the one-half of said 160-acre tract so recovered by plaintiff, and that there should be no partition of same so long as the defendant, W. J. Lee, should occupy it as a homestead. The court

also gave judgment for the defendant, W. J. Lee, for the sum of $223, rents and damages, and for the interveners for the sum of $175, rents and damages; and adjudged that they pay one-half of all costs incurred in this cause prior to the 22d day of May, 1899.

The case comes to this court on the findings of fact and conclusions of law of the trial court, which are as follows:

"1. I find that on the date alleged in plaintiff's third amended original petition, upon which this case was tried, the defendant, W. J. Lee, to secure the sum of $800 principal, evidenced by his promissory note and certain coupon notes for installments of interest, all that day executed by him to Albert L. Richardson, for the sum of $800 then loaned to him by said Richardson, executed his deed of trust conveying the two tracts of land described in plaintiff's said petition to Albert R. Shattuck as trustee for said Richardson.

"2. I find that said deed of trust contained power of sale, with right to appoint substitute trustee as alleged by plaintiff, and in short that it contained all the powers, terms, and provisions which plaintiff alleges it to have contained.

"3. I find that at the time he executed said deed of trust and notes said W. J. Lee was a widower with two minor children, the interveners in this case, his wife having died November 9, 1881.

"4. I find that said deed of trust was not executed to secure a community debt of defendant and his deceased wife, but that the debt so secured was contracted by him after his wife's death.

"5. I find that the 160 acres of land was at the time the deed of trust was executed the homestead of W. J. Lee and interveners, although they were not living upon it as such, the interveners then being of tender years and both being girls living with defendant's mother; but that it was the intention of defendant to have them reside with him and to remove them upon said 160 acres as soon as their ages would permit, but that said 160 acres was rented at the time said deed of trust was executed.

"6. I find that plaintiffs were charged with notice of the homestead character of said 160-acre tract and of intervener's title to one-half of same by the recitals contained in the patent issued by the State to said W. J. Lee for the same, which patent showed said tract to be a homestead donation.

"7. But I find that the 320 acres was not any of it used by defendant in connection with his homestead, and that it lay about a mile away from said 160-acre tract, was not improved nor inclosed, that defendant had other lands equally as available for homestead purposes as any part of said 320 acres, and that said Richardson and his trustee took said deed of trust and paid said money without any notice in law or in fact of any homestead claim to any part of said 320-acre tract.

"8. I find that the allegations in plaintiff's said petition as to the default of defendant in paying said notes, the refusal of said Shattuck to act, the appointment of O. R. Sholars, substitute trustee, the assign-

ment and conveyance to plaintiff by said Richardson of said notes, and all rights had by him under and by virtue of said deed of trust, the ratification by plaintiff of the appointment of said Sholars as substitute trustee, the sale by said Sholars as such substitute trustee of said two tracts of land under the power contained in said deed of trust, in manner and form as alleged by plaintiff, and the purchase by plaintiff at said sale; and in short all the allegations in plaintiff's said petition relating to the facts aforesaid and the proceedings and sale under said deed of trust are true.

"9. I find that if any of the community funds of W. J. Lee and the mother of interveners was used in the purchase of said 320-acre tract of land, that neither said Richardson or Shattuck had or were charged with any notice of that fact; that the legal title to said 320 acres vested in defendant by purchase long after his wife's death, the deed by which it was conveyed to him bearing date the 9th day of February, 1884, and that said Richardson and his said trustee took said deed of trust and paid the money loaned thereon in good faith and without any notice that community funds had been expended in its purchase or that interveners had or claimed any right to it. But I find that not more than $55 of community funds were expended in its purchase, and that the whole consideration was $205.

"10. I find that the legal title to said 160-acre tract of land was in W. J. Lee, and that he acquired the same after the death of his wife, the patent to him bearing date February 11, 1886. But I find that he actually settled upon said land in 1879 and filed upon said tract on the 11th day of February, 1880, during the lifetime of his wife, the mother of interveners, and that they continued to reside upon the same as homestead to the time of her death, and that after her death he continued to reside there until he completed the three years' occupancy and obtained a patent.

"11. I find that one of the interveners has ceased to be a member of her father's family, but that the other one, who is now above twenty years of age, resides with her father and constitutes a member of his family.

"13. I find that defendant has never abandoned or intended to abandon said homestead, but that he was forcibly and wrongfully ejected from the same and from said 320-acre tract by plaintiff on the 23d day of March, 1893, and that he has ever since intended to return and occupy it with his family as a homestead.

"14. I find that after dispossessing defendant as aforesaid plaintiff wrongfully held possession of said land until May 22, 1899.

"15. I find that the rental value of said 160-acre tract was $50 per year, and that the rental value of said 320-acre tract aggregated $48 for the full time for which it was wrongfully withheld from defendant.

"16. I find that interveners are entitled to one-half the rents and profits on the 160-acre tract, and that defendant is entitled to the other half, and the $48 allowed for the 320-acre tract."

Conclusions of Law.—"I conclude as a matter of law upon the above

findings that the plaintiff is entitled to judgment against defendant and interveners for the title and possession of the 320-acre tract of land.

"2. That plaintiff is entitled to judgment against defendant and interveners for the title to an undivided half of the 160-acre tract, but that they are not entitled to partition or to be admitted to possession of the same, so long as W. J. Lee shall occupy said 160 acres as a homestead.

"3. That defendant is entitled to judgment against plaintiff for $223 damages for rents and profits, and that interveners are entitled to judgment against plaintiff for $175 damages for rents and profits.

"4. That the deed of trust through which plaintiff deraigns title, in so far as the same affects interveners' interest in said 160-acre tract, should be canceled, and that interveners should have judgment for their undivided half interest in said 160-acre tract."

The appellant's first assignment of error complains of the ruling of the court in sustaining a demurrer interposed by the appellee to appellant's first supplemental answer. The contention is urged that as the plaintiff had previously elected to sue upon the notes and asked for a foreclosure of the mortgage or deed of trust, the judgment of the court as to that action in favor of appellant on his plea of limitation would estop the appellee from foreclosing the deed of trust by sale of the property according to the terms of the instrument by the trustee. In other words, having once elected to recover upon the note and to foreclose the lien, that was an election of the remedy that appellee would pursue and was tantamount to a waiver of all other rights it might have under the deed of trust. The doctrine contended for by the appellant, in our opinion, is not applicable to this case. This is not a case in which the appellee had two remedies, which by the application of either could accomplish the same result, for by the lapse of time and the interposition of the defense of limitation interposed by the appellant to the original action, the remedy in that particular did not, in legal effect, exist. The effect of the judgment sustaining appellant's plea of limitaiton was to declare that as to the remedy then invoked by the plaintiff he had no cause of action; that in view of the bar of the statute the courts would not extend relief to him in the manner in which in that particular suit it was sought; but the effect would not be to deprive him of other rights that he might have to foreclose his deed of trust independent of any action upon the part of the court. Davis v. Converse, 46 S. W. Rep., 910.

We are not inclined to agree with the contention of appellant, insisted upon in his second assignment of error, to the effect that the court erred in so much of the judgment as decreed one-half the costs against the appellant Lee and the interveners.

Appellee has a cross-assignment of error to the effect that the court erred in that part of its judgment wherein it was decreed that the plaintiff was not entitled to partition and to be admitted to possession of the 160-acre tract so long as the defendant Lee should occupy it as a homestead. The

deed of trust under which the lien in this case was foreclosed was executed by appellant Lee after the death of his wife and when he was a single man. He was at the time occupying the property with his daughters, the interveners, as his homestead. The decree of the court protected the interveners in their one-half interest in the 160 acres in controversy, but denied the right of partition and possession of the appellee, so long as the appellant Lee should occupy the premises as a homestead. As said in Hall v. Fields, 81 Texas, 558, "the children have no homestead rights as such in the home of either their father or mother," and further to the effect that their homestead right, if any, must be asserted by a guardian, if minors, properly appointed by the court. The findings of fact upon this subject do not show that the interveners are entitled to any homestead interest in the 160 acres. It is said in Lacy v. Rollins, 74 Texas, 566, and subsequent cases, that the surviving husband can create a valid incumbrance and lien upon his interest in the homestead. The appellant having executed the deed of trust for this purpose, a purchaser under it would acquire whatever right or interest the appellant had in the property at the time the instrument was executed and the sale by virtue of it. By virtue of article 16, section 52, of the Constitution, in a controversy between the heirs and the surviving husband or wife, the homestead during the lifetime of the latter could not be partitioned; but in Ford v. Sims, 93 Texas, 586, 57 Southwestern Reporter, 20, that provision of the Constitution and the statutes made in pursuance of it are held to apply only to controversies between the heirs and the surviving husband or wife, and has no application when a third party, a creditor, asserts a right in the homestead property by virtue of a title acquired from the survivor. The trial court in support of its judgment evidently relied upon an expression contained in the opinion in the case of Harle v. Richards, 78 Texas, 80. We are not prepared to say that that case is directly in point upon the question involved here; but if it could be held that such is its effect, we doubt its correctness. If the surviving husband has the power by deed of trust to create a valid lien on his interest in the homestead, in the absence of some statute to the contrary, we see no reason why a purchaser under that deed of trust would not acquire all the rights as against the husband that would exist in a case where the latter had by deed directly conveyed the property to the purchaser. If Lee in this instance had, by deed, conveyed his interest in the property to appellee, the latter clearly would have been entitled to possession, and could, in a proper action, have recovered. A sale by the trustee under the deed of trust in pursuance of its terms should be given the same effect. Lee, by the terms of that instrument, made the trustee his agent and empowered him to sell, and when in the pursuit of the agency this power was accomplished, the deed and conveyance executed would have the same effect in law as if executed by Lee, and would carry with it all of the uses and rights of ownership to the property conveyed, which as one of its incidents includes use and possession. Therefore, we think that appellee is correct in its contention upon

this question, and that the court should have decreed a writ of possession in favor of appellee as against the appellant Lee, so far as his interest in the 160 acres is concerned; and that the court should have taken the proper steps as requested and as provided by law to partition this portion of the land in controversy between the appellee and interveners.

In disposing of appellee's second cross-assignment of error, it is only necessary to state that we agree with it in its contention that the interveners were only entitled to the sum of $154.16, and we think that the calculation made by appellee as to this amount is practically correct.

In accordance with the disposition that we have made of the question raised by appellee's first cross-assignment of error, the appellant is not entitled to any damages or rents arising from appellee's possession of the 160-acre tract. The judgment in appellant's favor in the sum of $48 for rent of the 320-acre tract is correct.

The judgment of the court is affirmed, so far as it decrees title in appellee, and is reversed with instructions to render its judgment so as to decree appellee a writ of possession for the interest of appellant in the 160-acre tract and to take such steps towards partitioning the same as is provided by law, and to render judgment on the issues of damages and rents in controversy, in accordance with the opinion of this court.

Affirmed in part and reversed with instructions in part.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY v. SOUTHWESTERN TELEGRAPH AND TELEPHONE COMPANY.

Decided March 13, 1901.

1.—Foreign Corporation—Permit—Eminent Domain.

A foreign corporation which has obtained from the Secretary of State a permit to do business in this State under article 745, Revised Statutes, has the same power to exercise eminent domain as is granted by the law to a similar corporation organized under our law.

2.—Eminent Domain—Telephone Company.

Under Revised Statutes, articles 698, 699, 642, a telephone company has the same right to exercise eminent domain as that given by the law to a telegraph company.

3.—Eminent Domain—Condemnation—Appeal—Deposit of Award.

Under the Act of April 15, 1899, plaintiff in condemnation proceedings, on appeal by the defendant from the judgment of condemnation, may secure the right to enter on the property, pending the appeal, by making the deposit and bond there required.

4.—Same—Retroactive Law.

The Act of April 15, 1899, providing for entry on condemned premises pending an appeal, affects the remedy only, and is not invalid, as applied to proceedings pending when it was enacted, on the ground that it is retroactive and prohibited by the Constitution.

Appeal from Lamar. Tried before Hon. E. S. Chambers.

H. D. McDonald and *J. W. Terry,* for appellant.

McLaurin & Wozencraft, for appellee.

COLLARD, ASSOCIATE JUSTICE.—This is a suit by the appellant, the Gulf, Colorado & Santa Fe Railway Company, against the Southwestern Telegraph and Telephone Company for injunction, filed November 28, 1899, to enjoin and restrain the defendant from entering upon plaintiff's right of way to construct a telephone line, pending appeal by plaintiff from the award of commissioners condemning the right of way on plaintiff's right of way for the purposes of the telephone line between Paris and Ladonia, Texas. The petition shows that prior to the suit defendant had instituted proceedings for condemnation, and commissioners had been appointed for condemnation and returned their award of damages. The petition also shows that the commissioners had made their report to the county judge of the amount of damages assessed by them on the 26th day of June, 1899, assessing and awarding damages for the thirty miles at $150, and the railway company appealed July 3, 1899, to the County Court. Defendant deposited $300, double the amount of the award in the County Court of Lamar County, as required by the act of November 23, 1899, paying at the same time all costs of condemnation proceedings up to that date, and at the same time made bond as required by law to pay further costs that might be adjudged against it. The appeal to the County Court is still pending. The petition shows that the railway company appeared before the commissioners of condemnation and made obection to the application for condemnation, and the commissioners afterwards, on the 23d day of June, 1899, heard the application and the objections thereto, condemned for the purpose asked, and made the award of damages.

The petition also avers that any statute of the State which authorizes the entry upon its right of way upon deposit of double the amount of the award of the commissioners is retroactive and contrary to sections 16 and 17 of the State Constitution, and is therefore of no effect. The petition also sets up that it appears from the application to condemn that the telephone company is not incorporated under the laws of this State and not authorized to condemn property for its use; but it is not alleged that defendant is not authorized by the State by permit to do business in the State.

The facts set up are verified by affidavit. Defendant filed general and special exceptions to the petition and a sworn answer setting up that it had a permit from the State to do business therein.

The court sustained special demurrers to the petition for injunction, and plaintiff declining to amend, judgment was rendered dissolving the temporary injunction and dismissing plaintiff's bill, from which plaintiff has appealed.

Opinion.—1. It is settled law in this State that a foreign corpora-

tion created for the purpose of erecting and maintaining telegraph and telephone lines, having obtained from the State a permit to do business, has the right of eminent domain for its right of way, and the court below did not err in sustaining appellee's exception to the petition claiming that appellee had no such power. The sworn answer of defendant, appellee, that it had such a permit, was a complete defense to the averment that it had no authority to do business in this State. The statute, article 745, provides that upon compliance with the law, the Secretary of State shall issue a permit to a foreign corporation to do business in the State and that "such corporation, on obtaining such permit, shall have and enjoy all the rights and privileges conferred by the laws of this State on corporations organized under the laws of this State." So that we conclude that a foreign corporation with a permit to do business in the State is upon the same footing as a corporation created by the Legislature.

We also believe that telephone lines under our statutes have the same right of eminent domain to condemn lands for its use as are granted to telegraph lines. The Supreme Court of this State in the case of Railway v. Telegraph and Telephone Company, 93 Texas, 313, 55 Southwestern Reporter, 117, construing our statutes (Revised Statutes, articles 698, 699, and 642, section 8), maintains the doctrine that the statute authorizing condemnation of land for telegraph lines includes telephone lines.

2. We believe there can be no doubt that after commissioners of condemnation have made their report of award to the county court for damages assessed for property taken, as in this case, paying all accrued costs, and double the amount of damages is deposited in the court and the bond required by statute by the defendant, the company may proceed to construct and operate its lines, notwithstanding an appeal has been taken.

It is provided by act of the Legislature, approved April 15, 1899, the Legislature having adjourned May 27, 1899, that pending litigation in condemnation proceedings the corporation may enter upon the property sought to be condemned after award, if defendant deposit the amount of damages awarded, subject to the order of defendant, paying all costs awarded, and deposit in court a further sum equal to the amount of damages awarded and execute bond to pay further costs that may accrue.

Defendant complied with the act in all particulars on the 23d day of November, 1899, the foregoing act being in full force. This suit for injunction was not brought until November 28, 1899. These facts appearing in plaintiff's petition, the court acting on defendant's demurrer correctly decided that it was shown that defendant had the right to enter upon the right of way of plaintiff for use as a telephone line and that the Act of 1899 controlled the question at issue. Railway v. Telegraph and Telephone Co., 58 S. W. Rep., 152; Odum v. Garner, 86 Texas, 376-378.

The contention that the Act of 1899 applied to the facts of the case

would be retroactive, is not believed to be correct, as will be seen by the authorities last above cited. The statute affected the remedy and acted on the case then pending, nothing appearing in the act excepting proceedings then pending. The appellee by complying with the Act of 1899 could invoke its protection, though the original proceeding was commenced prior to its enactment.

We find no error in the judgment of the lower court, and it is affirmed.

Affirmed.

Writ of error refused.

Gulf, Colorado & Santa Fe Railway Company v. J. N. Porter.

Decided March 13, 1901.

1.—Carrier—Live Stock—Damages.

See evidence held to support a verdict in the amount of $518.55 for damages in transportation of 128 head of cattle, by delay, rough handling, insufficient food and water, and muddy pens.

2.—Carrier—Delay—Regular Trains.

A carrier can not avoid liability for failure to transport cattle within a reasonable time by showing that its regular trains did not connect in time to avoid the delay.

3.—Carrier—Feeding and Watering Cattle—Pleading—Evidence.

An allegation in a suit against a carrier for damages to live stock in their transportation, that they were delivered in a damaged condition through defendant's negligence and delay in transporting them, was sufficient to admit evidence as to failure to properly feed and water them; and such evidence was also admissible on the issue made by defendant, that their injury was due to their wild and restless nature, as showing the cause of their restlessness to be the fault of defendant.

Appeal from the County Court of Hill. Tried below before Hon. J. B. Reynolds.

B. K. Goree and *J. W. Terry,* for appellant.

Bledsoe & Bledsoe and *Wear, Morrow & Smithdeal,* for appellee.

COLLARD, Associate Justice.—Suit in the County Court by J. N. Porter for alleged damages to stock cattle while being carried by defendant from Ballinger to Blum, Texas, October 9, 1899, alleging that the cattle were not carried in reasonable time and that they were often jarred and knocked down by rough handling in switching, were confined in muddy pens, unnecessarily unloaded at Brownwood, and six head so badly injured that they were killed or abandoned on the way.

Answer by general demurrer, general denial, and special answer that the cattle had been carefully and expeditiously handled, but that they

were thin and weak when received, and unruly and vicious, and that if injured, the injury resulted from their own condition and fighting propensities. That it was necessary to unload them at Brownwood to make connection with defendant's train to Temple. Defendant also pleaded that it was stipulated in the contract of shipment that the cattle were not to be transported in any specified time, and that plaintiff assumed all risks of injury to the cattle resulting from their disposition; and further that plaintiff agreed to take care of the cattle en route, and if they were injured, it was due to the negligence of plaintiff to properly care for them.

Plaintiiff replied by demurrer and general denial, and specially that any agreement of plaintiff not to hold defendant liable for injuries to the cattle arising from its own negligence is void, and that if the cattle were unruly and were maimed, it resulted from want of proper care of defendant to provide proper pens and water.

Verdict and judgment for plaintiff for $518.55, from which defendant has appealed.

Opinion.—1. The court instructed the jury that if injuries to the cattle resulted from the condition or disposition of the cattle, plaintiff would not be entitled to recover; and appellant contends that it was shown by a preponderance of the evidence that at the time of the shipment the cattle were poor and weak, and that plaintiff, notwithstanding, loaded them on the cars for a trip of nearly 300 miles, and that defendant was therefore not responsible.

The shipment consisted of 60 cows and heifers, 20 two-year-old steers, and the rest yearlings or "coming yearlings," except two bulls, 128 head in all. The testimony of plaintiff showed that the cattle were damaged on the trip at $8 per head, or over $1,000, though plaintiiff sued for only $6 per head, $768. He recovered $518.55, an amount less than that sued for, and an amount less than would have been warranted by the testimony. It is not the province of the court to determine the true amount of damages the jury should have allowed. The law leaves that question with the jury, and unless the verdict should be apparently excessive, the court should not interfere. In this case we could not do so. Testimony adduced by the plaintiff shows that he bought the cattle in the country about 30 miles from Ballinger; they were stock cattle and in good condition, not crippled or bruised. He drove them to Ballinger and "they stood the trip nicely." They were loaded on defendant's local freight and carried seventy-five or eighty miles to Brownwood, where they were held in muddy pens sixteen or seventeen hours without sufficient feed and water, and were then reloaded and carried to Temple on a mixed train, a long, tiresome trip, all day and night going the distance, about 100 miles, the train making frequent stops, having the effect to worry the cattle and knock them down. They were not fed at Temple, remained there four hours, and were then

carried to Blum on defendant's road, being eight or nine hours on the way. On arrival at Blum they were in bad condition, skinned up and muddy, all skinned more or less. Six of the cows died during the shipment and three after they were unloaded and received at Blum. Of the six that died on the way, three were left at Brownwood, one died while being unloaded, and two others were killed in the pens at the same place. Plaintiff testified: "They were put in the Santa Fe stock pens at Brownwood and they were in bad shape; it had been raining and they were muddy. The cattle were put in three pens, and the company's employes gave the cattle three bales of hay to each pen, or nine bales to the 128 head of cattle. They filled the troughs in the three pens and went away. I went to the pens about daylight on the morning of the 28th and the cattle were very restless. There was just a little water in the bottom of the troughs. They were crowded around the troughs all trying to get it. Some of them were down, and some of them had been hooked over in the troughs. I hunted up the agent and asked him to put more water and feed in the pens. In the course of an hour he came to the pens and turned on more water in the trough, and put nine more bales of hay in the pens. * * * The cattle quieted down when they were watered and fed. The cattle were watered at the creek, as they were driven in to Ballinger on the evening of the 26th. They had no water from that time until they got the water at Brownwood."

Dave Schley testified for plaintiff that he knew the cattle. "I saw them about two days before they were shipped. They were average cattle, neither fat nor poor. They were in as good flesh as any cattle in that country. I helped to drive them to Ballinger."

M. W. Brigham, witness for plaintiff, testified that he knew the cattle: "I helped to drive them. It took about a day and a half to drive them from the pasture to Ballinger. They were not very troublesome in driving. They were quiet. Their condition was very good when they got to Ballinger. They were stock cattle. The cattle were in good shape."

J. H. Spreadman, witness for plaintiff: "I know the bunch of cattle in question, and saw them when they arrived at Blum. The cattle were in pretty bad shape,—in bad condition. Some of them were dead,—some were down, some had their necks crooked around." The witness thinks that there were none dead among the yearlings.

T. R. Gannoway, witness for plaintiff, testified that in the condition they were in at Blum they were worth from $10 to $12 per head, and such a lot of cattle in average flesh would have been worth an average of $18 to $20 per head. The cows about $26 per head.

There was testimony adduced by defendant to the effect that the cattle were poor and in bad condition on arrival at Ballinger, and were worth much less than the estimate made by plaintiff's witnesses.

We can not say the verdict was unsupported by the testimony as to failure of defendant to carry the cattle in a reasonable time, nor that it was excessive in amount. The verdict was not for as much as the tes-

timony of plaintiff would have warranted. These questions were for the jury to determine, and while they might have rendered a different verdict for a less amount, it was their province to decide the matters and we can not disturb the finding.

Appellant contends that the delays were absolutely necessary, especially at Brownwood; that the cattle were carried on as soon as the regular trains arrived. Defendant received the cattle for shipment, and it was its duty to transport them in a reasonable time. If the trains did not connect in time to avoid the delay, it can not claim immunity from the consequences on that ground.

It does not appear that the cattle were injured or famished for water as claimed by defendant on arrival at Ballinger. They were watered the evening before arrival. Porter testified that they stood the trip nicely, and were in good condition. It was the morning after they were put in defendant's pens that they were restless for want of water and "feed," and as soon as they were fed they quieted down.

The jury might well have concluded that it was the want of water and sufficient "feed" that caused them to be restless and hook and crowd one another, and not because of their being wild and unruly.

2. Appellant complains that the court submitted as an element of recovery the issue as to whether the cattle had been properly fed and watered. The petition shows that "when the cattle were delivered to plaintiff at Blum they were in bad condition, being bruised and drawn, and were greatly damaged and injured." It is also averred that defendant "agreed and bound itself to transport the same as expeditiously as possible, and in as good condition as possible." These allegations are sufficient to admit proof of the cause of the drawn and damaged condition, and that defendant failed to comply with the obligation to carry the cattle in as good condition as possible; and under the issue so made it might be shown that they were not fed and watered. Plaintiff distinctly alleged that if the cattle were unruly it resulted from and was caused by the failure to provide proper pens and water. The averments were sufficient to predicate a charge by the court authorizing a recovery from neglect of defendant to furnish feed and water.

3. The testimony as to want of feed and water was also admissible upon the issue made by defendant that the cattle were wild and vicious, and so from these causes they injured themselves. There was proof that when they were fed and watered they quieted down. So the proof of want of feed and water was also admissible upon the issue made by defendant.

4. The charge of the court and the charge given at request of defendant were as favorable to defendant as they should have been, and it was not error to refuse other instructions asked by defendant.

It was correct to refuse defendant's requested charge to the effect that if it were necessary to unload the cattle at Brownwood in order to comply with the law that cattle shall not remain loaded upon cars longer than twenty-eight hours without feed and water, and if they were held for

that purpose and to connect with a regular train, then there could be no recovery for the alleged delay. It is clear that the cattle were not held at Brownwood as long as they were to comply with the law as to feeding and watering; nor could defendant be excused for such delay on the ground that the delay was to secure the further shipment by the regular train.

It is not necessary to express our views as to other assignments. We have considered every issue in the case as presented in appellant's brief and find no error requiring reversal. We believe the judgment of the lower court should be affirmed, and it is so ordered.

Affirmed.

FRANK KEPPERT v. AULTMAN, MILLER & CO.

Decided March 20, 1901.

Sale—Action for Price—Tender of Goods.

If a vendor of personal property can ever, in this State, maintain an action for the purchase price against a purchaser who refuses to receive the goods and carry out the contract, it can only be upon tender of the specific property unincumbered by any lien, or waiver of such tender.

Appeal from the County Court of Milam. Tried below before Hon. W. M. McGregor.

Henderson, Streetman & Freeman, for appellant.

Morrison & Wallace and *N. H. Tracy,* for appellee.

KEY, ASSOCIATE JUSTICE.—Appellees sued appellant for the contract price of a certain binder. From a judgment against him appellant has appealed, and we sustain his fourth proposition under his first, second, fifth, tenth, and eleventh assignments of error. The proposition referred to is this: "If the vendor in a contract of sale of personal property can ever maintain an action for the purchase price, when the vendee refuses to comply with the terms of the contract, he can not do so unless he tenders to the vendee the article sold unincumbered by any lien."

The uncontradicted testimony shows that appellees shipped two binders to their agent, Lee Clark, at Rockdale, Texas; that the freight charges on the entire shipment were $117.85; that after the shipment arrived at Rockdale appellant repudiated the contract, and stated that he would not pay the freight nor receive the binder; that at the time of trial the railroad company was still in possession of both binders, holding them for the freight charges referred to and for storage, and that neither binder would be delivered to appellant, Clark, or anyone else, until the entire charges for storage and freight upon both binders were paid.

From this it will be seen that if appellant should tender to the rail-

road company half the freight charges due for the transportation of the two binders, the company would not deliver either binder to him. Therefore, if for no other reason, appellees are not in a position to maintain an action to recover the contract price. If such right exists at all in this State, there must either be a tender by the plaintiff of the specific property, or a waiver of such tender, and the property must be free from incumbrance and in such condition as that the judgment of the court will have the effect of establishing the defendant's title and right of possession thereto. The undisputed testimony coming from both sides shows that appellees are not entitled to maintain this action, and for this reason the judgment will be reversed and here rendered.

Whether or not they have a right of action for damages is a question we are not called upon to decide, as the suit was brought for the contract price of the property and not for damages.

The judgment of the County Court will be set aside and judgment here rendered for appellant.

Reversed and rendered.

R. H. LANE v. S. H. JACK.

Decided March 20, 1901.

Forcible Entry and Detainer—Appeal.

Article 2540, Revised Statutes, making the judgment of the county court final in cases of forcible entry and detainer, except where damages are awarded in excess of $100, denies the right of appeal from a judgment of the county court dismissing the appeal of a plaintiff in a justice court from a judgment there for the defendant.

Appeal from the County Court of Kaufman. Tried below before Hon. John Vesey.

Lee R. Stroud, for appellant.

Jack & Jack, for appellee.

KEY, ASSOCIATE JUSTICE.—Appellee sued appellant in the Justice Court in an action of forcible entry and detainer. From a judgment in appellee's favor, appellant appealed to the County Court, where upon motion of appellee, the appeal was dismissed, and appellant now attempts to appeal to this court. Appellee recovered no damages in either court.

Appellee has submitted a motion to dismiss the appeal, predicated upon article 2540 of the Revised Statutes, which in substance provides that when an action of forcible entry and detainer is appealed to and tried by the county court, the judgment of that court shall be conclusive, and no further appeal be allowed, except where there is a recovery

of damages in an amount exceeding $100. There can be no mistake about the meaning of the statute, and it is quite clear that it cuts off the right of further appeal in this case. Yarbrough v. Jenkins, 3 App. C. C. (Willson), sec. 464; Stein v. Stely, 32 S. W. Rep., 861.

Motion sustained and appeal dismissed.

GANS BROTHERS ET AL. v. S. MARX ET AL.

Decided March 27, 1901.

Limitation—Judgment Lien—Fraudulent Conveyance.

An action to subject to the lien of a registered judgment land fraudulently conveyed by the judgment debtor, accrued at the date of the registration and was barred by limitation in favor of the transferree in four years therefrom.

Appeal from McLennan, Nineteenth District. Tried below before J. G. Winter, Esq., Special Judge.

John W. Davis, S. E. Stratton, Robt. H. Rogers, and *Sleeper & Kendall,* for appellants.

L. W. Campbell and *H. N. Atkinson,* for appellees.

KEY, ASSOCIATE JUSTICE.—This is a creditors' bill brought by several creditors of S. Marx to enforce liens alleged to be secured by registration of abstracts of judgments against Marx. This suit was brought against S. Marx and his daughter Mollie Lowenthal and her husband Paul Lowenthal. Some of the creditors sued as plaintiffs and others intervened, setting up similar rights. Marx disclaimed as to all of the property except one piece claimed by him as his homestead. Lowenthal and wife, among other things, by demurrer, pleaded the four years statute of limitation. The trial court sustained the latter plea, and that ruling is assailed by the appellants.

The lands involved are situated in McLennan County, and appellants pleaded the recovery and registration in said county of their several judgments in 1893, 1894, and 1895, and the issuance of executions with returns nulla bona thereon. They also alleged that in 1892 S. Marx, being the owner of some of the property and intending to defraud his creditors (among whom were appellants), conveyed the same to his daughter Mollie Marx, now Mollie Lowenthal; that in 1892 and 1893 S. Marx purchased the other tracts of land, paying the consideration therefor himself, but caused conveyances thereto to be made to Mollie Marx, with like intent to defraud creditors. Appellants also charged that S. Marx has continuously remained in possession of the property and was in possession of it when the suit was brought; also that since the registration of appellants' judgments S. Marx, on his voluntary ap-

plication, was adjudged a bankrupt; that he scheduled no assets and claimed that he had none, and that none of the claims of plaintiffs and interveners were filed or approved in the bankruptcy proceeding. The prayer of the bill is that the lands described be declared to be the property of S. Marx and held in trust by his daughter Mollie Lowenthal and liable to the payment of the judgments of the suing creditors; that said lands be sold for the payment of said judgments, and for the benefit of any other creditors who may join in the suit and bear their portion of the expense, and for any other order that may be found necessary for the full protection of the rights of the creditors, and for all special, general and equitable relief to which they may be entitled. The original petition was filed October 13, 1900.

Article 3358 of the Revised Statutes reads thus: "Every action, other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward."

There is no other provision of the statute that could possibly apply to suits of this character, fixing the period of limitation at a greater length of time than four years, unless it could be held that this is an action for the recovery of real estate, and that it is not such an action is well settled by former decisions of our Supreme Court. This being the case, the article quoted has application to this suit, and it must be held that the cause of action was barred. If the pleadings under consideration disclose any cause of action they show, in the absence of averments of concealment of material facts, that such cause of action sprang into existence immediately after the registration of the several judgments referred to, which occurred more than four years before the suit was brought. For an elaborate and satisfactory discussion of the four years statute of limitation, as applicable to suits of this nature, see McCampbell v. Durst, decided by the Court of Civil Appeals at Galveston, 40 Southwestern Reporter, 315.

No reversible error having been pointed out, the judgment of the district court is affirmed.

Affirmed.

Writ of error refused.

N. R. RUTHERFORD ET AL. v. J. D. COX.

Decided March 27, 1901.

Homestead—Occupancy—Intention.

When the homestead of a family is exchanged for an improved farm intended to be occupied as a home, their homestead rights attach thereto as against an execution creditor, before any actual occupancy.

Appeal from Collin. Tried below before Hon. J. E. Dillard.

F. E. Wilcox and *G. R. Smith,* for appellants.

Abernathy & Beverly, for appellee.

FISHER, CHIEF JUSTICE.—This was an injunction suit brought by appellee, J. D. Cox, seeking to restrain appellant and J. W. Pafford, sheriff of Collin County, Texas, from selling under execution a tract of 51 3-5 acres of land in Collin County, Texas, levied on by virtue of an execution for $403.48, issued from the County Court of Collin County in favor of N. R. Rutherford, against J. D. Cox. Appellee claimed said land as his homestead.

Ulsey Cox, wife of appellee, intervened and claimed said land as her separate property, and that the same was the homestead of herself and husband.

Trial before a jury, and the verdict for the appellee, J. D. Cox, and judgment entered enjoining perpetually the sale of said tract of land, and judgment in favor of appellees (plaintiff and intervener) for all costs of suit.

The only question of fact we deem it necessary to make any finding upon is the issue of homestead. We find that the property in controversy was the homestead of J. D. Cox and wife at the time that the levy of the execution was made. The property in controversy was a farm for which Cox and wife traded their home in McKinney in the fall of 1898. At the time of the trade they acquired the property in controversy intending to use it as their homestead, and such intention was never abandoned.

These facts bring the case within the rule announced by this court in the case of Evans v. Daniel, ante, p. —, 60 Southwestern Reporter, 1012.

We have carefully considered all of the assignments of errors, and are of the opinion that none of them are well taken; therefore the judgment of the court below is affirmed.

Affirmed.

Writ of error refused.

FOURTH DISTRICT, 1901.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v. EDWIN BALL.

Decided March 6, 1901.

1.—Variance Between Allegation and Proof—Practice on Appeal.

The rule that an objection that the verdict is contrary to the evidence will be deemed as waived if not called to the attention of the court below in a motion for a new trial applies where the objection is that the proof offered by a party is variant from the allegation in his pleading.

2.—Same—Variance Not Shown.

Where, in an action for damages against a railway company, plaintiff alleged that his wife was refused permission to ride in the car for white people and forced to ride in the negro coach, and the proof showed only that the train conductor, after having twice promised to do so, failed to assist the wife to change from the colored coach to the one for whites, there was no variance, since the proof was reasonably sufficient to establish the substance of the issue.

3.—Damages for Mental Anguish Alone.

Damages for mental pain, anxiety, distress or humiliation suffered, if the direct result of a common carrier's failure or neglect to perform its duty, may be recovered, though unaccompanied with physical injury, pain, or suffering.

4.—Same—Common Carrier—Putting White Woman in Negro Coach.

A common carrier is liable in damages for such discomfort and humiliation as proximately result from its action in compelling a white woman and her children to ride in a coach designed for and occupied by negroes.

5.—Same—Use of Profane Language.

Such damages as result from the humiliation caused by profane language used by the negroes in the presence of plaintiff's wife while in the negro coach were not recoverable where it was not shown that such misconduct of the negroes was known to the carrier or its servants. (Neill, Associate Justice, dissenting.)

6.—Same—Excessive Verdict.

A verdict against a railway company for $1000 for compelling a white woman to ride in the negro coach for sixty miles is held grossly excessive, and a remittitur of $900 required.

Appeal from Dallas Tried below before Hon. Richard Morgan.

T. S. Miller and *Marshall & Thomas,* for appellant.

T. E. Conn and *Moroney & Love,* for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by the appellee, Edwin Ball, to recover from appellant actual and exemplary damages alleged to have been sustained by the former by the treatment of the railway company to plaintiff's wife, A. P. Ball, while a passenger on one of its trains. The following are the allegations in appellee's petition upon which he seeks to hold the appellant liable:

"That said A. P. Ball was and is a respectable white woman. That in violation of the law and of its said contract, said defendant company refused the said A. P. Ball and children permission to ride in a car provided for white people and forced her to ride from Dallas to Hillsboro, in Hill County, a distance of about sixty-six miles, in a car provided for negroes, which car contained a number of negroes, who during the whole trip on said 3rd day of January, were drinking some kind of intoxicating liquor, using loud and vulgar language, making offensive remarks concerning plaintiff's said wife, and using unseemly familiarities with each other, and frequently addressing insulting remarks to her, to her great annoyance and discomfort. That by reason of said conduct the said A. P. Ball was greatly pained, wounded, and injured in body and mind, to her damage and injury in the sum of five thousand dollars actual damages. Wherefore, plaintiff prays for process, for judgment for five thousand actual, and for one thousand dollars exemplary damages.

"That defendant had, in utter violation and reckless neglect of its public duty, been running coaches containing disorderly people between Dallas and Hillsboro, Texas, ever since the 1st day of November, 1895. That during said time defendant failed and refused to provide for the preservation of good order in said coaches. That during all of said time the defendant was in the habit of placing respectable white ladies in said disorderly coaches and subjecting them to the insults and annoyance of their disorderly occupants."

The appellant answered by a general denial; and specially plead, that if appellee's wife rode in a coach provided for negroes with colored passengers, she did so from her own choice, and was not compelled to do so by appellant or any of its agents; and by pleading the statute of limitations of two years, in averring that more than that period had elapsed from the time of the injury until the issuance and service of the citation.

The case was tried without a jury and judgment rendered in favor of appellee for $1000, from which it has appealed.

The undisputed facts are, that on the 3rd day of January, 1898, appellee purchased tickets for his wife and three children, who are white people, entitling them to first-class passages, in cars provided for their race, over appellant's line of road from the city of Dallas to Galveston. After purchasing the tickets he accompanied his wife and children on the train, and having carried them on the coach running to their destination, and failing, on account of that car being too crowded, to procure seats for them, appellee was told by appellant's conductor that they would have to go in the forward cars. He then went forward with his wife and children into the other cars, but was unable to find seats for them. In his efforts to find room to seat his wife and children, he continued forward until they entered the coach designed for negroes. He did not observe that it was the car provided for colored people until he got inside with his wife and children. Then the train started, and not

having time to remove them from that car and leave the train with safety, he told his wife as soon as the conductor came in to have him change her and the children to another car, and leaving them, he got off the train. Shortly afterwards the conductor came in the car, and appellee's wife told him she did not want to ride in the car for negroes, and he promised her that he would come in and move her and her children into another car when they reached the next station. Having failed to move her and the children when the train arrived at the next station, as he had promised, she again asked the conductor to change her to another car, which he promised to do at the next stopping place. After this she never saw the conductor any more until the train reached Hillsboro. She also told appellant's porter two or three times that she wanted to get into a car for white people, and did not want to ride in the negroes' car. The porter also promised to assist her and the children in getting into another car. But he, like the conductor, failed to render the promised assistance. She was afraid to attempt to go from one car to another with her little children while the train was in motion, without assistance and so informed the conductor and porter. There were a good many stopping places between Dallas and Hillsboro. She remained in the negroes' car until the train arrived at Hillsboro, where all the passengers were required and offered an opportunity to change cars. There were a good many negroes in the car while appellee's wife was in there. Some of whom were smoking and using profane language. Mrs. Ball was rendered very uncomfortable, and was much humiliated by being thus compelled to ride in said car, and by the conduct of the negroes in there.

Conclusions of Law.—1. It is contended by the appellant that there is a variance between the allegations in appellee's petition and the proof offered on the trial, in that he alleged his wife was refused permission to ride in the car for white people and forced to ride in the negro coach, while the proof only shows that appellant's conductor failed to assist his wife to change from the colored coach to the one provided for white people. In our opinion it is a sufficient answer to this contention to say that it was not raised by appellant in the court below by its motion for a new trial. The rule is that an objection that the verdict is contrary to the evidence, when not specifically called to the attention of the court by motion for a new trial, will be deemed as waived, and can not be made the basis of an assignment of error on appeal. Jacobs v. Hawkins, 63 Texas, 4; Ysleta v. Babbett, 8 Texas Civ. App., 432; Clark v. Pearce, 80 Texas, 150. If, however, the question were properly raised, we would not be prepared to say that the proof is not reasonably sufficient to establish the substance of the issue raised by the pleadings. The coaches provided for whites were so crowded that appellee could not find seats for his wife and children in them. In this effort to find such accommodations as was appellant's duty to provide for its passengers, appellee carried his wife and children in the negroes' car. When

he found they were in the wrong coach he did not have time to change them and get off the train with safety. He relied upon its conductor's finding seats for them and changing them to a car provided for white passengers. This was, without being requested, the conductor's duty. This duty, though requested by appellee's wife, he failed to perform. Through his failure to perform this duty, she and her children were compelled to remain in the negro coach, and such compulsion amounted to a refusal to allow them to ride in a car provided for white people.

2. Again, it is contended that the judgment is not supported by the evidence, because it is not shown that appellee's wife sustained any damages by reason of having to ride in the negro car. The proposition advanced to support this contention is that damages are not recoverable for mental distress or humiliation unaccompanied with physical pain or suffering. In not seating appellee's wife and children in a coach provided for white people and compelling them, on that account, to ride in the negro car, appellant violated its contract and failed to discharge its duty as a common carrier, and for the breach of contract and neglect of duty is liable for such damages as it ought to have reasonably anticipated would flow therefrom. That damages for mental pain, anxiety, distress, or humiliation suffered, if the direct result of appellant's failure or neglect to perform its duty, may be recovered, though unaccompanied with physical injury, pain or suffering, is now too well settled in this State to admit of question. Railway v. Armstrong, 93 Texas, 31, and authorities cited. Railway v. Perkins, 52 S. W. Rep., 124. To withhold from a white lady the right to ride in a coach such as the law requires to be provided for her race, and to compel her and her children to ride in one occupied by negroes, for whom under the law it was provided exclusively, constitute such a violation of law and breach of duty as render a common carrier of passengers liable in damages for such discomfort and humiliation as are proximately caused from such breach of duty.

3. The majority of the court is of the opinion that damages for such humiliation as was caused by profane language, used by the negroes in the presence of appellee's wife, are not under the facts in this case recoverable, because it is not shown that such misconduct of the negroes was called to the attention, or known to appellant's conductor, it being such as could not have been reasonably anticipated by the appellant or its servants in control of the train. The writer, however, is of the opinion that, as the act of appellant in compelling appellee's wife to remain in the negro coach was a violation of the law, it is liable for all the consequences of such violation whether it could have reasonably foreseen them or not.

4. There are no facts in the record which tend to support appellant's plea of limitations.

5. The court is of the opinion that the judgment is grossly excesssive, and that a judgment for $100 will be full compensation for all the dam-

ages sustained. Therefore, if appellee will within twelve days from this date enter in this court a remittitur of $900 the judgment will be affirmed, otherwise it will be reversed and the cause remanded.

Affirmed upon remittitur entered.

J. H. ANDERSON ET AL. v. R. B. NEIGHBORS.

Decided March 6, 1901.

1.—State School Land—Sale to Married Woman.

The Supreme Court having answered in the negative a certified question in this case whether a married woman who had purchased school land from the State and occupied it as an actual settler for five years had lost her right to the land by virtue of certain acts relative to keeping the interest due thereon to the State paid up, the judgment of the trial court in favor of a subsequent applicant to lease the land from the State is reversed, and judgment is rendered sustaining the married woman's title, which had been erroneously marked "Forfeited" by the Commissioner of the General Land Office.

2.—Same—Statute Construed.

The terms of the statute authorizing a sale of State school lands to "any person" are broad enough to include a sale to a married woman, whose right to acquire and hold property in Texas is as absolute as that of her husband.

Appeal from Pecos. Tried below before Hon. J. M. Goggin.

B. C. Thomas and *Sanford & Douglas,* for appellants.

Walter Gillis, for appellee.

FLY, ASSOCIATE JUSTICE.—In answer to a certified question in this case the Supreme Court has rendered an opinion that determines the issues in favor of appellants. Reference is made to that opinion for our conclusion of facts and the law applicable to the case. 1 Texas Ct. Rep., 213; 94 Texas, —; 59 S. W. Rep., 543.

Following that opinion the judgment of the District Court is reversed and judgment here rendered in favor of appellants.

Reversed and rendered.

ON MOTION FOR REHEARING.

In the statement made by this court in certifying the question to the Supreme Court, it was distinctly stated that "Mrs. Anderson, a married woman, applied for and purchased from the Land Commissioner the land in controversy, and made the payment required of her at the time and gave the written obligation for the balance." It was also stated that "Mrs. Anderson and her husband have been in possession of the land since her purchase in 1895, and they have made valuable improvements on the land, and have occupied it as a homestead up to the time of the trial." With these facts before the court, it was answered "that

Mrs. Anderson's right to the land had not been lost under the circumstances stated in this case, and that the lease contract, executed after the written request made by her, conferred no right upon the lessee." That the contract of purchase was made by a married woman was clearly before the Supreme Court, and we can not for a moment conceive that the court would have answered that Mrs. Anderson had not lost her right to the land if she had no right to lose.

In the case of Pitts v. Elsler, 87 Texas, 347, it was said: "In this State the right of a married woman to acquire and hold property, real and personal, either by gift, devise, descent, or purchase, is as absolute as that of her husband. She may, with his consent, mortgage her real estate to secure his debts, or she might give her personal property to him or any other person. If she contract to buy on a credit and execute a note for the price, she may or may not, as she may elect, proceed with the contract, and the person contracting with her can not refuse to carry out the agreement because she is a married woman."

There is but one ground upon which the contract made with Mrs. Anderson can be declared void, and that is that she is not a "person" in the contemplation of the statute, and that the law expressed in the Pitts-Elsler case does not apply to a contract with the State, as was held as to minors in the case of Walker v. Rogan, 93 Texas, 248.

Much that is said in that case in regard to minors it would seem might apply with equal force to married women, but the opinion does not in terms extend so as to include married women, and it may be presumed from the answer to our question that they will not be so included.

Independent of the expressions in the Walker-Rogan case, we would experience no difficulty in holding that when the State, through its duly accredited agents, has entered into a contract with a married woman. it would occupy the position of an individual contracting with her, and could not refuse to carry out the agreement because she is a married woman. We do not believe that the doctrine of the Walker-Rogan case should be extended to a married woman, but that it must be held, as in Elsler v. Pitts, that "in this State the right of a married woman to acquire and hold property, real and personal, either by gift, devise, or descent. or purchase, is as absolute as that of her husband." See Lee v. Green, 58 Southwestern Reporter. 196 and 847, in which writ of error was refused by the Supreme Court.

If that be the law of Texas, the Legislature must have had the married woman in contemplation when it used the broad term, "any person," and never intended to exclude her from the right to acquire a home out of the public lands for herself and her children.

The facts in this case establish that five years before the time of trial Mrs. Anderson had purchased the land in controversy from the State of Texas, and had made all payments required by law, giving her obligation for the unpaid purchase money, that she was in possession of the land when her application was made, and together with her husband

has ever since made it her home, expending money upon it and improving it. The State is satisfied with the sale to her, and not only is not attempting to repudiate it, but, on the other hand, through its Commissioner of the General Land Office, has endeavored to uphold it. Appellant, to whom the State has refused to lease the land, alone seeks to avoid the contract between the State and its vendee because she is a married woman. Weatherford v. McFadden, 21 Texas Civ. App., 260.

Believing that, in answering that Mrs. Anderson had not lost her right to the land, the Supreme Court must have intended to hold that she had a right to the land, and believing that a married woman is included in the broad term "any person," the motion for rehearing is overruled.

Overruled.

Writ of error refused.

ANN PARKER ET AL. v. J. D. WOOD.

Decided March 6, 1901.

Married Woman—Liability of Separate Estate—Attorney's Fee.

Where a husband and wife were jointly sued on the wife's subscription to a railway company, and the husband employed an attorney to defend the suit, the wife's separate estate could not subsequently be charged by judgment in an action brought by such attorney for his fee, in the absence of evidence that his employment was contracted for by the wife, or by her authority.

Appeal from the County Court of Grayson. Tried below before the Hon. H. L. Beaty.

M. T. Jones, for appellants.

NEILL, ASSOCIATE JUSTICE.—This suit was brought in the Justice Court by J. D. Wood against Ann Parker and her husband, T. H. Parker, to recover $141.25 alleged to be due for legal services rendered by the appellee for the benefit of Ann's separate property. In the Justice Court a judgment was rendered in Wood's favor, from which Mrs. Parker appealed to the County Court. Upon the trial there, which was without a jury, judgment was rendered in favor of appellee against Mrs. Parker, as a debt against her separate estate, the sureties on her appeal bond, and T. H. Parker, for the sum of $147.50, together with a foreclosure of an attachment lien on certain real property. The judgment provides that no execution shall issue against T. H. Parker after the attached property is levied on and sold. From this judgment Mrs. Parker has alone appealed to this court.

It appears from the evidence that Ann Parker, while the wife of T. H. Parker, signed a subscription list payable to the Cotton Belt Railroad for $500; that one O. T. Lyons brought suit against her and her husband on said subscription, procured an attachment and caused it to be levied

on land the separate property of Mrs. Parker; that her husband employed J. D. Wood, an attorney at law, to represent him and his wife in the defense of said suit; that the defense of the suit was for the purpose of protecting her separate property; that there was at the same time pending a suit styled O. T. Lyon v. McFarland, which was agreed on as a test case, it being the understanding that the case against the Parkers should abide the result of that case; to carry out this agreement T. H. Parker and his wife Ann both executed a bond in favor of O. T. Lyon, conditioned that Ann Parker should abide the action of the court in the McFarland case, and that if that case was adjudged against the defendant, she should pay the amount of her subscriptions; that the McFarland suit was defeated, and consequently Mrs. Parker did not have to pay anything. It does not appear from the evidence who represented the defendant in the McFarland suit. No authority is shown from the evidence to have been given by Mrs. Parker to her husband to employ appellee, or counsel to defend her in the suit brought by Lyon in which appellee represented her. Nor is there anything to show that she knew that Wood was representing her in that suit when she made the bond to Lyon obligating herself to abide the decision in the McFarland case.

The question is, can the judgment against Mrs. Parker, subjecting her separate estate to the debt, be upheld by these facts?

The wife may contract debts for the benefit of her separate property (Revised Statutes, article 2970), and when it shall appear upon the trial of a suit therefor to the satisfaction of the court and jury that she contracted such debt for that purpose, and that the debt so contracted was reasonable and proper, the court is required to decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff. Rev. Stats., art. 2971. The debt which will authorize such a decree must be contracted by the wife, or by her authority. Christian v. Smith, 10 Texas, 123; Milburn v. Walker, 11 Texas, 329; Magee v. White, 23 Texas, 180; Menard v. Schneider, 48 S. W. Rep., 761. The right conferred by law upon the husband to manage the wife's separate property does not limit the powers of the wife, nor give special authority to the husband with reference to the debts and contracts contemplated by Revised Statutes, article 2970. Milburn v. Walker, supra; Magee v. White, supra; Warren v. Smith, 44 Texas, 247; Owen v. Land Co., 32 S. W. Rep., 1059.

Though the debt sued for may have been for the benefit of Mrs. Parker's separate property, yet as there is no evidence tending to show that it was contracted by herself or her authority, the judgment against her, charging her separate estate therewith, can not be sustained. Therefore it is reversed, and judgment is here rendered in her favor.

Reversed and rendered.

ELLEN SILCOCK ET AL. v. MARY H. BAKER ET AL.

Decided March 13, 1901.

Married Woman's Deed—Acknowledgment Before Husband—Limitation of Three Years.

A deed by a married woman conveying her separate property, and acknowledged before her husband, is void and does not estop her from claiming the land, and as it constitutes neither title nor color of title, it will not support the three-years statute of limitations.

Appeal from Bexar. Tried below before Hon. J. L. Camp.

Jay Minter and *J. M. Eckford,* for appellants.

Lewis Maverick, for appellees.

NEILL, ASSOCIATE JUSTICE.—The appellant, Ellen Silcock, joined by her husband, brought this suit against Mary H. Baker, who was joined by her husband, in the form of an action of trespass to try title to recover certain parcels of land. Appellees, defendants below, answered by a plea of not guilty, and plead that the deed under which Mrs. Silcock claims the property was made by Mary H. Baker to her separate property, and that her pretended acknowledgment thereto was taken by Andrew Silcock, the husband of Ellen, and for that reason the deed was void, and a cancellation thereof prayed for.

The case was tried by the court without a jury, and judgment rendered that the plaintiffs take nothing by their suit, and in favor of the defendants on their plea of reconvention for a cancellation of the deed.

Conclusions of Fact.—The appellee, Mary H. Baker, is the common source of title under which both parties claim, the property being upon the 28th day of August her separate estate, she then being and is now a married woman. On the 28th day of August, 1894, she, with her husband John F. Baker, signed an instrument purporting upon its face to be a deed conveying the premises in controversy to Ellen Silcock. On the same day the instrument was acknowledged by Mary H. Baker before Andrew Silcock, a notary public in and for Bexar County, Texas, who was at the time of the execution of the purported conveyance and of such acknowledgment, the husband of the grantee, Ellen Silcock. The instrument was afterwards, on the 31st day of August, 1894, acknowledged by J. F. Baker, the husband of the grantor, before a notary public of Travis County, Texas. The evidence shows that it was agreed between the parties that, as a consideration for the conveyance to Ellen Silcock, Mary H. Baker should receive the boarding house furniture contained in a certain boarding house conducted by the appellants, together with the supposed good will of the boarding house business. The furniture was never delivered to appellees, but was all taken away by appellants

upon leaving said premises except a small part thereof, which was offset by certain furniture transferred by appellees to appellants in the same transaction. The supposed good will of the business was of no value.

Conclusions of Law.—The following counter-propositions taken from appellees' brief, in our opinion, state the law applicable to the facts in this case:

"(1) The deed of a married woman to her separate property, though absolutely free and voluntary, unless acknowledged as prescribed by law, will not pass to the parties claiming under it either a legal or equitable title. It is the statutory acknowledgment which gives her deed validity, her signature being a nullity without her privy examination, acknowledgment and declaration before some officer authorized to take the same. Rev. Stats., arts. 635, 4618; Berry v. Donley, 26 Texas, 745, and approved by an unbroken chain of decisions.

"(2) It is essential to the validity of an acknowledgment that it should be taken before some officer authorized by law to take acknowledgments, and who is not disqualified to take the particular acknowledgment. A party to a deed, or identified with the transaction, or one having a pecuniary interest in the subject, is not competent to take the acknowledgment of the instrument. Rothchilds v. Daugher, 85 Texas, 333; Association v. Heady, 50 S. W. Rep., 1079 (Texas Civ. App.), and cases cited; same case, 57 S. W. Rep., 583, and cases cited.

"(3) Although in a case where, as a matter of fact, an acknowledgment has been taken by an officer authorized and qualified to take it, and he has failed to properly certify the fact, the court may hear proof and correct the certificate, yet where there has never been an acknowledgment before an officer qualified to take it, there is no basis for action on the part of the court. There is nothing to correct or which can be corrected. Association v. Heady, 50 S. W. Rep., 1079 (Texas Civ. App.); Johnson v. Taylor, 60 Texas, 360.

"(4) But had appellee, Mary H. Baker, received the value of the land as purchase money, she would not be estopped in asserting her title. A married woman who seeks to recover her separate estate illegally conveyed without her acknowledgment as prescribed by law, is not required to refund the consideration received as a condition of recovery. Johnson v. Bryan, 62 Texas, 625; Owens v. Land Co., 32 S. W. Rep., 1060 (Texas Civ. App.), and cases cited.

"(5) The pretended conveyance from Mary H. Baker, under which appellants claim, passed neither a legal nor equitable title, and could certainly, therefore, constitute neither a title nor color of title, which would protect the appellants under the three years statute of limitation. Berry v. Donley, 26 Texas, 747."

The judgment is affirmed.

Affirmed.

G. E. BENNETT v. W. H. STRATTON.

Decided March 20, 1901.

Plea of Privilege—Waiver of—Jurisdiction.

Defendant, being sued out of the county of his residence, filed with his answer a plea to the jurisdiction, asserting his privilege to be sued in his own county. His attorney, over the telephone, asked plaintiff's attorney to have the case set for a day certain of the appearance term, and the latter stated that he would insist upon this as a waiver of the plea, and defendant's attorney said he would not agree to waive his plea. Plaintiff's attorney then, in accordance with this conversation, had the court to enter an order setting the case for a day certain "by request of defendant's attorney." Held, that there was no waiver of the plea of privilege.

Appeal from the County Court of Johnson. Tried below before Hon. W. D. McKay.

Wallace Hendricks, for appellant.

Henry, Brown & Patton, for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit was brought in the County Court of Johnson County by appellee against appellant on the 4th day of June, 1900, to recover the sum of $500 alleged to be due upon a written contract, the terms of which, from our view of the case, need not be stated.

The appellant, defendant below, on the 30th day of June, 1900, filed a plea in abatement, in which he alleged that he resided in Tarrant County, as was avered in plaintiff's petition, and not in the county of Johnson, and in such plea he made such further necessary allegations as showed his right to be sued in the county of his domicile, which right he claimed in said plea as his privilege. Subject to this plea the defendant on the 2d day of July, 1900, filed an answer to the merits.

On the 14th day of July, 1900, the plaintiff, by supplemental petition in replication of defendant's plea in abatement, alleged that on the 3d day of July, 1900, the defendant by his attorney appeared in the case, and without calling the court's attention to the plea of privilege requested, agreed and consented that the case be set for trial on the merits as well as on said plea to its jurisdiction upon a particular day.

On the 14th day of June, 1900, the case was tried by the court without a jury, who, after hearing the evidence upon the issue of fact thus raised upon the plea in abatement, decided thereon in favor of plaintiff. It then tried the case upon its merits, and rendered judgment in favor of plaintiff for the amount sued for.

The action of the court in not sustaining appellant's plea in abatement is assigned as error.

The facts relative to this assignment are as follows: It was admitted upon the trial that the facts stated by defendant in his plea to the juris-

diction are true. The following entry appears on the judge's docket: "By request of defendant's attorney, case set by agreement for July 14th." The attorney for plaintiff then testified as follows: "About July 2d or 3d, the plaintiff's attorney, Mr. Wallace Hendricks, called me up over the telephone, he then being in Fort Worth. I was one of the attorneys for the plaintiff in the above case. Tuesday, July 3, 1900, was appearance day in the County Court of Johnson County. The following is the substance of the conversation that occurred between me and the defendant's attorney over the 'phone: Mr. Hendricks asked me to have the above case set down for trial at a particular day of the term of the court. I asked whether he meant to have it set down for trial on the merits or on the plea of the jurisdiction. He replied on both. I told him I would agree to set the case down for a day certain, but would not agree to do so without prejudice to his plea to the jurisdiction, and that I would insist that such appearance by him and his having the case so set down would be a waiver of his plea. Then, in accordance with the agreement made over the telephone, I went over to the courthouse and in open court had the entry above written made on the court docket. Neither the exception nor plea to the jurisdiction was called to the attention of the court until the 14th day of July, when the case was called for trial by the court. Mr. Hendricks said he would not agree to waive his plea of privilege."

In our opinion these facts do not bring the case within the provisions of article 1291, Revised Statutes, nor constitute a waiver of appellant's privilege of being sued in the county of his residence. It clearly appears from them that in his agreement with plaintiff's counsel defendant did not intend to waive his plea in abatement, and that plaintiff's counsel, when he agreed with him to set the case for that time, knew that he did not intend to waive his right to be sued in the county of his residence. Plaintiff's supplemental petition itself avers that defendant's attorney in having the case set "requested, agreed, and consented that the case be set down for trial on the merits as well as on said plea to the jurisdiction." This shows the construction of plaintiff's counsel of the agreement to set the case, and in view of it, as well as the facts, it was error to hold that the defendant, by appearing through his counsel and having the case set for trial at a day of the appearance term of court, had waived his right to be heard upon said plea.

Until the defendant, as was his right, was heard on his plea of privilege, which, it seems from the admissions and evidence, should have been sustained, the assignments of error going to the merits of the case, in our opinion, should not be considered.

For reason of the error indicated, the judgment of the court is reversed and the cause remanded.

Reversed and remanded.

P. A. LACKEY v. JOHN P. CAMPBELL.

Decided March 27, 1901.

Appeal from Justice Court—Plea of Suit Pending.

Where plaintiff sued in justice court and defendant pleaded that a suit was then pending in the district court between the same parties which involved the same subject matter, and the plea having been sustained, plaintiff appealed to the county court, and after such appeal the suit in the district court was dismissed, it was error for the county court to sustain the same plea when there interposed by defendant, since the appeal had the effect to dissolve the justice's judgment, and the case was to be tried in the county court de novo upon the law and facts as then existing and applicable.

Appeal from the County Court of Bexar. Tried below before Hon. Peter Jonas.

J. R. Norton and *Ed Haltom,* for appellant.

T. F. Shields, for appellee.

JAMES, CHIEF JUSTICE.—The action was brought in Justice Court to recover the value of a cow. Defendant Campbell pleaded that a suit was then pending in the District Court between the same plaintiff and defendant which involved the same subject. This plea was sustained, and plaintiff appealed. After the appeal, and before trial in the County Court, the suit in the District Court was dismissed. Defendant interposed the same plea, which was sustained. The reason advanced in support of this ruling is that the matter was jurisdictional, and that the abandonment of the cause which was pending in the District Court, not having been taken until after the appeal from the justice's judgment had been perfected, the County Court had no more power to proceed to judgment than the Justice Court had when it acted.

We are of opinion that the court erred in sustaining the plea. The matter was not jurisdictional. The statute authorizes this character of plea, and if it had not been interposed, and the justice had rendered judgment for plaintiff, there could be no question of the validity of the judgment. If the proceeding on appeal had been revisory merely, the judgment rendered by the justice would have been affirmed, because he committed no error under the conditions that then existed. But on appeal from such judgments the trial is de novo. New issues may be heard and determined. If the plea had not been made before the justice, it could nevertheless have been filed in the County Court. The appeal, when perfected, did not suspend the judgment merely, but dissolved it, and the proceeding in the County Court was, so far as this pleading was concerned, virtually a continuation of the suit.

Reversed and remanded.

FIFTH DISTRICT, 1901.

J. H. NEELY ET AL. v. GRAYSON COUNTY NATIONAL BANK, GARNISHEE.

Decided March 2, 1901.

1.—Garnishment—Equitable Assignment of Fund in Bank.

Where a debtor, having funds to his credit in a bank, drew a check thereon in favor of one of his creditors before garnishment of the bank by another creditor, the delivery of the check operated as an equitable assignment of so much of the fund, although the bank had no notice thereof at that time, and the bank was authorized to make payment of the check after the garnishment had been served upon it.

2.—Same—Setoff by Bank—Insolvent Debtor—Notes Not Due.

A bank, when garnished by creditors of one of its depositors who has become insolvent and who is indebted to it by notes secured by personal indorsement, has the right, as against the garnishing creditors, to set off the deposit so in its hands against such notes, although the notes be not yet due.

Appeal from the County Court of Grayson. Tried below before Hon. J. D. Woods.

Charles Crenshaw, for appellant.

A. L. Beaty, for appellee.

BOOKHOUT, ASSOCIATE JUSTICE.—Appellant J. H. Neely recovered a judgment in the County Court of Grayson County on September 12, 1899, against Frank Schwulst for the sum of $317.02, with interest and costs. Execution was regularly issued upon the judgment, and on the 11th day of August, 1900, J. H. Neely filed her affidavit for garnishment and caused a writ of garnishment to issue against the Grayson County National Bank, a corporation, which writ was served on the 11th day of August, 1900. The bank answered denying any indebtedness to Frank Schwulst. This answer was controverted by J. H. Neely on the 4th day of September, 1900. On August 25, 1900, Frank Schwulst filed his petition in bankruptcy in the United States Court for the Eastern District of Texas, and on the 27th of August was adjudged a bankrupt. H. N. Tuck was appointed trustee of the estate of said bankrupt, and thereafter, on the 24th of September, said trustee was granted permission by the County Court to intervene in this suit, on which day he filed his plea of intervention. On September 25, 1900, the garnishee filed its amended answer in this suit; admitting, among other things. that Med-

die Schwulst, wife of the said Frank Schwulst, bankrupt, had deposited in its bank, on the day of the service of the said writ upon it, the sum of $245; that said bankrupt was indebted to the said bank, by two promissory notes, one for the sum of $300, dated July 30, 1900, and due ninety days after date, the other for the sum of $125, dated August 15, 1900, and due September 1, 1900; that both notes were secured by personal security; the first note for $300 being signed by the bankrupt, his wife, Meddie Schwulst, and A. A. Fielder, and the second note, for the sum of $125, being signed by the bankrupt, his wife, Meddie Schwulst, and Frank Hamblin. That on the 10th day of August, 1900, Meddie Schwulst had drawn a check in favor of L. Eppstein & Son, of Denison, for the sum of $113.36. That because of the indebtedness of the said bankrupt to it, in the sum of $425, and on account of the check which had been drawn upon it and presented to it after the writ of garnishment had been served upon it, it had the legal right to retain all the money deposited with it in the name of Meddie Schwulst, and apply, first, to the payment of the said check, and then the balance to its own debt pro tanto. Upon these issues this case went to trial and was submitted to the court without the intervention of a jury, and resulted in judgment for the defendant garnishee, and that the garnishee recover cost, including an attorney's fee for $20. The trustee, Tuck, and plaintiff have appealed.

The court filed conclusions of fact as follows: "At the time of the service of the writ of garnishment herein there stood on the books of the Grayson County National Bank of Sherman, garnishee herein, a credit in the name of Meddie Schwulst in the sum of $245, which represented a deposit of money made on that day, the same being an ordinary deposit, and not a special one. On August 10, 1900, which was prior to the service of said writ, said Meddie Schwulst, in payment of a debt of said Frank Schwulst, drew her check in favor of said L. Eppstein & Son, on said fund in said bank, for $113.36, and delivered the same to said L. Eppstein & Son, which said check was, on August 15, 1900 (which was after the service of said writ), presented to said bank, paid by it, and charged to said account of said Meddie Schwulst against the credit aforesaid. At the time of the service of said writ, Frankk Schwulst, the defendant, who was and is the husband of said Meddie Schwulst, was indebted to the Grayson County National Bank, garnishee herein, in the amount of two promissory notes, one for $300, dated July 9, 1900, and due ninety days after date, and one for $125, dated August 1, 1900, and due August 15, 1900, both bearing interest after maturity at the rate of 10 per cent per annum. The first note was also signed by Meddie Schwulst and A. A. Fielder, and the second by said Meddie Schwulst and Frank Hamblin. Both were joint and several in form, but said Fielder and Hamblen were sureties. Said Frank Schulst is insolvent and has been since prior to the time said writ was served; and on the 25th day of August, 1900, filed his petition in bankruptcy, and was, on the 27th day of August, 1900, duly adjudged and is now a bankrupt,

and the intervener, H. N. Tuck, was duly appointed trustee of his estate, and qualified as required by law, and is now acting as such trustee, and is authorized to intervene herein. Shortly after the service of said writ, said bank, with the consent of said Frank Schwulst and Meddie Schwulst, applied the amount which is held to the credit of said Meddie Schwulst on the notes hereinbefore mentioned, and the money so applied was the money of said Frank Schwulst, althought it had been deposited in the name of his wife. A reasonable fee for preparing and filing the garnishee's answer herein and for representing it on the trial is $20."

1. Appellant contends that the trial court erred in finding (1) that the money on deposit in the bank belonged to Frank Schwulst; (2) that Frank Schwulst was insolvent prior to the time the writ of garnishment was served, and (3) that the bank, with the consent of Frank and Meddie Schwulst, applied the amount which it held to the credit of Meddie Schwulst on the notes of Frank Schwulst.

The evidence is amply sufficient to show that the money deposited in the name of Meddie Schwulst in the garnishee bank was the community property of Frank and Meddie Schwulst. We think the evidence also fairly supports the court's findings that Frank Schwulst was insolvent prior to the service of the writ of garnishment, and continued so thereafter. There is evidence from which the court was authorized to find that Frank and Meddie Schwulst consented to the application of the money on deposit to the payment of the note. The court's findings of fact will not be disturbed by this court if there be evidence fairly tending to support the same. We conclude that the court's findings are supported by the evidence, and they are adopted by this court.

2. The first question of law arising upon this appeal is, did the check drawn in favor of L. Eppstein & Son prior to the service of the garnishment operate as an equitable assignment of the fund on deposit to the amount of the check? An order drawn by a debtor on a specific fund and delivered to the creditor is an equitable assignment of the fund to the amount of such order, although the party upon whom the order is drawn has no notice thereof. Notice of the assignment to the party upon whom the order is drawn only becomes material in order to prevent payment of the fund to the assignor, or to a subsequent purchaser from the assignor without notice of the prior assignment. Harris County v. Campbell, 68 Texas, 22; Smith v. Railway, 39 S. W. Rep., 969; Scheuber v. Simmons, 2 Texas Civ. App., 672; Bank v. Convery, 8 Texas Civ. App., 181; Bank v. Beilharz, 62 S. W. Rep., 743.

In this case the check was drawn by Meddie Schwulst upon a specific fund to pay a debt owing by her husband to L. Eppstein & Son, and was delivered to the creditor before the service of the writ of garnishment. This operated as an equitable assignment of the fund to the amount of such check, and authorized the bank to make payment thereof out of such special fund. The fact that after the date and delivery of said check the writ of garnishment was served upon the bank would not de-

feat the right of Eppstein & Son to have the amount of the check paid to them. The writ of garnishment only seized such credits and effects as the bank had belonging to the defendant in garnishment. After the assignment to L. Eppstein & Son, Schwulst had no interest in the money so assigned subject to garnishment. The bank had ceased to be a debtor of Schwulst by such assignment and became a debtor of Eppstein & Son.

3. The next question presented is, did the bank have the equitable right to apply the money on deposit to the payment of Schwulst's notes, he being insolvent, although said notes had not matured and were secured by personal indorsement? The general rule is that only mutual debts which have matured can be set off against each other. Allbright v. Aldrich, 2 Texas, 166. An exception to this rule, however, is allowed where the party against whom the setoff is plead is insolvent. In such a case it is held inequitable to permit the party who sues to recover, leaving the defendant, who holds a just demand for which plaintiff is liable, without any security to enforce its payment. Castro v. Gentiley, 11 Texas, 28; Henderson v. Gilliam, 12 Texas, 71; Hamilton v. Van Hook, 26 Texas, 302.

We think it clear that, under these authorities, when Schwulst became insolvent, the bank had the equitable right to set off his notes held by it against the deposit. Was this right defeated by reason of the notes being unmatured and secured? So far as we are aware this question has not been passed upon by the court of last resort of this State. It was held by the Supreme Court of Tennessee, in the case of Nashville Trust Company v. Fourth National Bank, reported in 15 Lawyer's Reports, Annotated, 710, that a bank had the right to set off against a deposit unmatured paper of an insolvent depositor. To the same effect is the case of Fidelity Trust Company v. Bank, decided by the Supreme Court of Kentucky, 9 Law. Rep. Ann., 108; Armstrong v. Warren (Ohio), 17 Law. Rep. Ann., 466, and Hodgin v. Bank (N. C.), 32 S. E. Rep., 887.

The Supreme Court of Iowa held in the case of Thomas v. Bank, reported in 35 Lawyer's Reports, Annotated, 379, that a bank had the right to set off an unmatured note of an insolvent depositor against his deposit, and that this right was superior to those of the holder and drawee of a check drawn on the deposit, but of which check the bank had no notice until after the depositor's insolvency. In the case of Scammon v. Kimball, 92 United States, 362, it was held that a bank having insurance in a company which was rendered insolvent by the Chicago fire of 1871 had a right to set off the amount of his insurance on property consumed against money of the company in his hands on deposit, although the insurance was not a debt due at the time of the insolvency.

In the case of Carr v. Hamilton, 129 United States, 252, it was held that when a life insurance company becomes insolvent and goes into liquidation, the amount due on an endowment policy payable at a fixed

time may, in settling the company's affairs, be set off against the amount due on the mortgage deed from the holder of the policy to the company by way of compensation. The case of Schuler v. Israel, 120 United States, 506, was a suit brought by Schuler against Israel to recover a debt in which Schuler caused a writ of garnishment to issue and to be served upon the Laclede Bank. The garnishee bank answered, admitting that it had funds on deposit belonging to Israel, but set up that Israel was indebted to the bank in certain sums of money, some of which had matured and some had not matured at the time of the service of garnishment. The bank claimed the right, as Israel was insolvent, to set off the deposit in payment of his obligations held by the bank, whether due or not. It was held that the bank was entitled to the set-off. The court, in discussing the rights of the garnishee in that case, say: "As we understand the law concerning the condition of a garnishee in attachment, he has the same rights in defending himself against that process at the time of its service upon him that he would have had against the debtor in the suit for whose property he is called upon to account. And while it may be true that in a suit brought by Israel against the bank it could in an ordinary action at law only make plea of set-off of so much of Israel's debt to the bank as was then due, it could, by filing a bill in chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owned it, but which was not due, would be lost, be relieved by a proper decree in equity; and, as a garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the principal defendant in the main suit, he can set up all the defenses in this proceeding which he would have either in a court of law or a court of equity."

We think the language of the court in the case above cited is applicable to this case. Schwulst was insolvent prior to the service of the garnishment. The right of the bank to set off the deposit in payment of the notes accrued to the bank prior to the service of the writ of garnishment. It then could have instituted proceedings and compelled the set-off. The fact that the notes were secured by personal indorsement did not affect the bank's right to compel the set-off. It has been held that a surety in a proceeding properly brought could compel a set-off in such a case. Armstrong v. Warren, supra.

We conclude that there is no error in the judgment, and the same must be affirmed.

Affirmed.

FIRE ASSOCIATION OF PHILADELPHIA v. W. R. MASTERSON ET AL.

Decided March 9, 1901.

1.—Fire Insurance—Inventory—Iron Safe Clause.

Where a stock of groceries was replenished from time to time by shipments from another store belonging to the insured, who kept itemized lists of the merchandise so shipped, this was not a compliance with a provision in the iron safe clause of a policy on such stock of groceries requiring an inventory of the stock on hand to be taken and preserved.

2.—Same—Failure Not Excused.

That it is not practicable nor customary to procure from each customer from whom a grocery merchant purchases butter, eggs and chickens a bill or invoice thereof, is no excuse for such merchant's failure to comply with the provision in his policy of insurance requiring an inventory of the stock on hand to be taken in thirty days after the date of the policy.

3.—Same—Waiver of Requirement as to Inventory—Proofs of Loss.

See the opinion for evidence as to requiring proofs of loss after a fire, held not to constitute a waiver by the insurer of a provision in the iron safe clause of a policy requiring the insured to take and preserve an inventory of the stock of goods covered by the policy.

Appeal from the County Court of Hill. Tried below before Hon. J. B. Reynolds.

Alexander & Thompson, for appellant.

Wear, Morrow & Smithdeal, for appellees.

BOOKHOUT, ASSOCIATE JUSTICE.—The appellees, W. R. Masterson and L. E. Miller, as plaintiffs below, instituted this suit in the County Court of Hill County, against the appellant, defendant below, on two policies of insurance; one in the sum of $500, executed and delivered to L. E. Miller on the 16th day of December, 1899, and the other in the sum of $400, executed and delivered to L. E. Miller on the 9th day of January, 1900; each of said policies running for one year, and covering a stock of groceries kept in the name of L. E. Miller at the town of Whitney, Hill County, Texas, and each of said policies providing loss, if any, payable to W. R. Masterson, as his interest may appear. It was alleged that the full face of said policies, in the sum of $900, accrued by virtue of the total destruction of the stock insured on the 4th day of June, 1900.

Defendant answered with a denial, and special plea that each of said policies contained a covenant of warranty, known as the "iron safe clause." It was alleged by the defendant that the assured neglected, failed, and refused to comply with said iron safe clause, and neglected and failed to take the inventory required by the first section thereof, either within twelve calendar months preceding the issuance of the policies, or within thirty days thereafter, and in consequence thereof said policies became null and void. Defendant also plead a tender, and offered to return the premium paid on said policies; and further plead that the

assured neglected and failed to keep a set of books, showing a complete record of the business transacted, and failed and refused to produce the books, records, and inventories called for in the iron safe clause. It further plead that the fire described in plaintiff's petition was caused or procured by the assured in the policy named.

By supplemental petition plaintiffs alleged that they had complied with the terms of the iron safe clause, but that if the court should hold that a strict compliance with same had not been made, that the same was substantially complied with, in that the merchandise which was destroyed by fire was shipped by wagon from Hillsboro to Whitney, a distance of about thirteen miles, by Masterson, and that Masterson kept in his safe at Hillsboro itemized lists of merchandise so shipped and delivered to said Miller, and that the contract by which said Masterson furnished said Miller said goods, as aforesaid, began in the latter part of December, 1899, within less than twelve months of the time of the fire.

They further allege that the retail business, as conducted in the sale of groceries and produce, or perishable articles, necessitated a constant change in said stock, and that an inventory made six or twelve months before the fire would not furnish the safest and best means of ascertaining the amount of the loss, and would be of no practical use in determining the amount of goods on hand at the time of the fire.

Plaintiffs further alleged, that after the fire, defendant's agent investigated the fire, and became advised of all the facts and circumstances attending the fire, and fully informed himself of all the acts and doings of the plaintiffs relating thereto, and failed to deny liability under said policies, and led plaintiffs to believe that liability would not be denied, and that it would be necessary to furnish proofs of loss, and so believing, and in ignorance of defendant's intention to deny liability, plaintiffs incurred expenses in connection with the proofs of loss, within sixty days provided for in the policies; that after receiving them, defendant, for the first time, denied liability; wherefore, plaintiffs say that the defenses plead by defendant were waived.

There was a trial with the aid of a jury, resulting in a verdict and judgment in favor of plaintiff, from which judgment defendant has duly prosecuted an appeal to this court.

Opinion.—W. R. Masterson lived at Hillsboro, where he was engaged in the grocery business. L. E. Miller lived at Whitney, Hill County, Texas, where he was conducting a dry goods business. In December, 1899, Masterson started a grocery business in Whitney, which business was placed in charge of Miller, with the agreement that Masterson should supply the groceries from his store at Hillsboro, and all the profits over and above invoice cost were to be equally divided between them. Miller had authority to buy produce consisting of butter, eggs, chickens, etc., from the public generally as a part of this business. Both the dry goods and groceries were kept in the same storehouse, the stocks being

kept separate. Miller bought and sold country produce in connection with the grocery business.

On December 16, 1899, Miller took out a policy of insurance in appellant company for $500 on the stock of groceries, and on January 9, 1900, took out a second policy for $400, it being stipulated in the face of each of said policies that the loss, if any, was payable to W. R. Masterson as his interesst may appear. These policies contained a clause of warranty known as the "iron safe clause," reading:

"1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date. (2) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in first section of this clause, and also from date of last preceding inventory, if such has been taken, and during the continuance of this policy. (3) The assured will keep such an inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building; and unless such books and inventories are produced and delivered to this company for examination, this policy shall be null and void, and no suit or action shall be maintained thereon. It is further agreed that the receipt of such books and inventories and the examination of the same shall not be an admission of any liability under the policy nor a waiver of any defense to the same."

We only deem it necessary to discuss two questions presented by the appellant: (1) Was the warranty contained in the policies breached by the assured? and (2) if so, did the company waive the forfeiture resulting therefrom?

The property was destroyed by fire on June 4, 1900. The undisputed testimony of the assured, L. E. Miller, and W. R. Masterson, the beneficiary, is that there never had been an inventory taken of the goods insured. By the first clause of the warranty the assured covenanted to take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or the policy shall be null and void from such date. We have heretofore held that such a clause embraced in a policy of insurance is a warranty. Roberts v. Insurance Co., 19 Texas Civ. App., 338. This holding met the approval of the Supreme Court by its refusal of an application for writ of error.

The evidence shows that the groceries contained in Miller's store at Whitney were sent by Masterson from his store at Hillsboro, and that Masterson kept a duplicate of the invoices of the goods sent by him to Whitney, with a description of the goods and the amount that he charged for same. These invoices were tendered to the company to determine the amount of goods on hand at the time of the fire. The contention is that the furnishing of these invoices was a compliance with the warranty above set out requiring the assured to take and preserve an inventory of his goods on hand. We do not think that this contention is tenable. The invoices did not constitute such an itemized inventory of stock on hand as was contemplated by the terms of the warranty above set out. Roberts v. Insurance Co., supra; Assurance Co. v. Kemendo, 1 Texas Ct. Rep., 579; Insurance Co. v. Knight, 36 S. E. Rep., 824.

The contention that it is not customary nor practicable to procure from each customer from whom Miller purchased butter, eggs, and chickens a bill or invoice thereof is no excuse for not complying with the terms of the warranty requiring an inventory of the stock on hand to be taken in thirty days unless one had been taken within the preceding twelve calendar months. Again, it is contended by appellee that only a substantial compliance with the terms of the warranty is required. While this may be true, in this case the evidence shows that there was no compliance whatever, the undisputed evidence being that no inventory of the stock on hand had ever been taken. The rule that a substantial compliance meets the terms of the warranty has no application in this case.

It is claimed that if there was a breach of the warranty, it was waived by appellant. The evidence upon which appellees relied as a waiver of the forfeiture is a letter dated June 21, 1900, written by Trezevant & Cochran, general agents of the insurance company, to A. G. McMahan, at Whitney, in response to a letter by McMahan to them asking that they send blanks for Mr. Miller to prepare proofs of loss. This letter reads as follows:

"June 21, 1900.

"A. G. McMahan, Whitney, Texas:

"Dear Sir.—We have your favor asking us to send you blank proof of loss so Mr. L. E. Miller may prepare proof and forward it to this office. We regret that we can not comply with your request, but the proof of loss which the company furnishes us with are to be used when our adjuster arrives at a satisfactory settlement of the loss, and out of courtesy to the assured makes up his proof for him. Then again, if we were to furnish Mr. Miller with a blank proof of loss, if we got into a litigation with him it might be held that we had waived whatever defense we might have under the policy by reason of our furnishing the proof of loss.

"From your letter Mr. Miller seems to have an attorney, and we have no doubt that he can obtain a blank proof of loss by making application to any first-class bookstore in the State of Texas. Very truly yours,

"TREZEVANT & COCHRAN,"

In addition to the letter it was shown that an agent of the defendant company examined the books with Masterson shortly after the fire. Masterson testified that "he did not tell me whether it was necessary to get up proofs of loss or no."

The trial court instructed the jury that: "If you believe from the evidence that the plaintiffs failed to furnish the books, inventories and data mentioned in the iron safe clause quoted above, and shall further believe from the evidence that after the property insured was destroyed by fire the agents of the defendant company, having the authority to adjust the loss caused by said fire, investigated the same, and obtained from the plaintiffs all the books, inventories, and data which were in plaintiffs' possession and which they kept pertaining to said business, and after examining the same became aware of the fact that the plaintiffs had not kept and furnished the inventories, books and data required by said iron safe clause; and that with knowledge of said failure the said agents of defendant failed and refused to deny liability on said policies, and by acts, statements, and representations induced plaintiffs to believe that liability would not be denied, and that plaintiffs would be required to furnish the written proofs of loss provided for in the policies of insurance sued on, together with the data and magistrate's certificate mentioned in said policies, and that plaintiffs, relying upon said acts and representations, were led to believe that it was necessary for them to prepare and furnish to defendants such proofs of loss; and if you further believe, from the evidence that the plaintiff, so believing, expended time and money and went to great trouble in preparing proofs of loss, and in obtaining officers' certificates, as provided for in the policies sued on; and if you further believe from the evidence that by such acts, if any, leading plaintiffs to believe that liability would not be denied, and that proofs of loss would be required, the defendant waived any noncompliance with the iron safe clause, then you will not find for defendant on account of its plea of failure to comply with the iron safe clause, although you may believe that the same was not, in fact, complied with."

The evidence did not authorize the court to submit to the jury the issue of waiver. The examination of the books of the assured shortly after the fire was not in itself a waiver of the forfeiture. The agent making the examination did not instruct the assured to furnish proofs of loss. The letter from Trezevant & Cochran to McMahan upon its face shows that the general agents were seeking to avoid doing anything that might be regarded as a waiver of any defense they had to the policy. The letter referred to states that if they were to furnish Mr. Miller with blank proofs, in the event of litigation it might be held the company had waived its defenses. It was to avoid this that the blanks asked for were not furnished. The language clearly conveyed to the assured notice that the company did not intend to waive anything. The charge was not authorized by the evidence, and it was error to give the same. For the same reason it was error to give the charges complained of in the tenth and twelfth assignments.

The court did not errr in admitting the testimony complained of in the second, third, and fourth assignments, and they are overruled.

Under the case, as made, the court should have given the charge requested by appellant instructing a verdict for defendant, the refusal of which is made the ground of the seventh assignment.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

GLENN & ROWE v. E. D. SEELEY ET AL.

Decided March 23, 1901.

1.—Mortgage—Future Advances.

A mortgage may secure a debt in a stated sum, recited as evidence by a note for that amount (which, through oversight, was never actually executed), such debt consisting in part of an account then owing, and the remainder being intended to cover advances thereafter to be made to the mortgagor, and the mortgage will create a valid lien although there be no statement therein that any part of the indebtedness is for future advances.

2.—Same—Consideration—Pleading and Proof—Parol Evidence.

Parol evidence is admissible to show the true consideration of the mortgage, the intention to secure future advances, and to account for the nonexistence of the note, although the pleadings contain no allegation of fraud or mistake in the execution of the mortgage.

3.—Same—Description of Property.

Where the property is described in a mortgage as lots 7 and 8 in block 20 of the town of Mount Calm, in Hill County, Texas, as shown by the plat of said town of record in Hillsboro, to which reference is made for a more particular description, this is a sufficiently definite description to authorize a foreclosure.

Appeal from Hill. Tried below before Hon. J. M. Hall.

D. M. Short, A. G. Walker, and *A. C. Prendergast,* for appellants.

A. P. McKinnon and *L. A. Carlton,* for appellees.

TEMPLETON, ASSOCIATE JUSTICE.—On September 21, 1896, E. D. Seeley executed and delivered to J. P. Lewis, trustee for John A. Glenn, a mortgage upon two lots of land situated in Mount Calm, in Hill County. It was recited in the mortgage that Seeley was indebted to Glenn in the sum of $300 as evidenced by note of Seeley to Glenn for that sum, of even date with the mortgage, bearing 10 per cent interest from date, containing the usual attorney's fee clause, and due on November 1, 1897, and it was stated that the mortgage was given to secure said indebtedness. At that time Seeley owed Glenn $128.75 on account for goods sold and money advanced, but was not otherwise indebted to him, and no note was then given. Shortly thereafter, a note, similar in terms to the one described in the mortgage, was drawn, and Seeley started to

sign it, but his attention was called away and it was never signed, the fact being overlooked. After the mortgage was given, Glenn continued to advance goods and money to Seeley, the amount advanced between that time and January 30, 1897, being $323.10. During the same period Seeley paid to Glenn $228.50, leaving a balance due on January 30, 1897, of $223.35. J. F. Rowe had in the meantime become a partner with Glenn and interested in the account. Seeley owed Glenn and Rowe the further sum of $23.30 on account made by him with Rowe & Cochran, and on January 30, 1898, he executed and delivered to Glenn & Rowe his note for $246.65, being the amount of said account and the amount he owed Glenn. The note not being paid when it matured, Glenn & Rowe brought this suit against Seeley and a person to whom he had sold the mortgaged lands. The facts above stated were alleged in their petition, and they further pleaded that, at the time of the execution of the mortgage, it was contemplated and agreed between Glenn and Seeley that Glenn should continue to advance to Seeley goods and cash as demanded until his account amounted to $300; that the mortgage was given to secure the contemplated advances and the sum then owing on account; that the note for $300, described in the mortgage, was to be given to cover such account and advances. It was also alleged that the advances made between the date of the mortgage and time of the giving of the note for $246.65 were made in reliance on the said agreement and mortgage and in good faith. The trial court held that the plaintiffs had no lien on the lands in question, and, as the amount of their debt was below the jurisdiction of the district court, their suit in that respect was dismissed. This appeal is prosecuted from said judgment.

On the trial the appellants offered to prove by Judge Marshall Surratt the following facts: "I drew the trust deed in my office in the city of Waco, at the time it bears date. Mr. Seeley came in my office and stated to me, in substance, that he had been dealing with John A. Glenn, and was then indebted to him in some amount, I do not recall just what, and he had made an arrangement with Glenn for future dealing, by which Glenn was to make further advances to him, during that and the following year, and that he desired to secure Glenn for what he then owed him and the future advances, by a lien upon the two lots described in the trust deed, and he wished me to draw the papers. I discussed the matter of drawing the security with him, and the probable amount of future advances and when he was to pay same, and told him that he must name some amount as a limit, and also a limit of time of payment, and he stated that he did not expect to be at any time indebted to Glenn more than about $300, and I think stated that he expected to pay all of it before November 1, 1897, but that said date would give him at all events ample time. I know he finally told me to draw it so as to secure a note for $300 due November 1, 1897, and I did so. I do not remember whether he had me to draw the note or not. I explained to him that he could execute a note and trust deed in this way to Mr. Glenn, and deliver to him, as collateral to secure any amount up to $300 which he

should be indebted to Glenn, up to the maturity of the note, whether by note or open account, if taken as a collateral to the actual indebtedness, whatever it might be, and he stated that was what he wanted to do; and the trust deed was so prepared by his instructions, and, as he stated, for that purpose, and he and his wife executed and acknowledged it there, and carried it away. My recollection is that the $300 note was a suggestion of mine, to be deposited with the trust deed as collateral for whatever indebtedness should really exist, and that Mr. Seeley adopted this suggestion. The conversation was brought about by Mr. Seeley coming to me to prepare security for Mr. Glenn, as before stated."

Whereupon the appellees objected to the introduction of said testimony upon the following grounds: (1) Said testimony tends to explain what occurred in connection with the execution of the deed of trust, and it speaks for itself. (2) Because the contract or agreement with the parties was reduced to writing, and what occurred is not admissible under the general rules. (3) Because there is no allegation of fraud or mistake in the drawing of the deed of trust, and the testimony is to show that the deed of trust was not to secure the debt as evidenced by the note, but for the future advances to be made. The objections were sustained by the court and the testimony excluded.

Appellants also offered to prove by the witnesses, J. P. Lewis and John A. Glenn, respectively and separately, that at the time said trust deed was executed and delivered it was understood and agreed between said Glenn and Ed D. Seeley and wife that the trust deed was to secure what said Seeleys owed Glenn, amounting to $128.75, and for what goods, wares, and merchandise Glenn should from that time to November 1, 1897, sell and deliver to Seeley, and what money he should at that time advance to him, and that it was estimated between the parties to the trust deed at the time, that the sum of $300 would cover all of these amounts; and that Glenn, after the execution of the trust deed, and upon the security thereof, from time to time from the date thereof to November 1, 1897, sold to said Seeley goods, wares, and merchandise and advanced to him money, as shown by the account introduced in evidence in that cause; that Glenn would not have sold Seeley goods, etc., nor advanced to him the said money unless said trust deed had been executed, and that the note for $300 called for in the trust deed was to be made up of said amounts, to wit, the $128.75, and for what goods, wares, merchandise, and money Glenn should sell and advance to Seeley during said time, and that that was the debts that the said trust deed secured, and that was the way the amount of the $300 was arrived at. To the introduction of which evidence the appellees objected on the ground that there is no allegation in the pleading of fraud or mistake in drawing the deed of trust, and there being no ambiguity in the deed of trust, it was incompetent to prove a contemporaneous agreement by oral testimony not incorporated in the deed of trust; which objections were sustained by the court and said testimony excluded.

We are of opinion that the evidence was admissible. In Jones on

Mortgages, sections 374-376-384, the law is stated thus: "It is not necessary that the mortgage should express on its face that it is given to secure future advances. It may be given for a specific sum, and it will then be security for a debt to that amount. * * * The sum expressed by the mortgage may cover a present indebtedness as well as future advances, and it is not necessary that the one should be separated from the other on the face of the mortgage. * * * A mortgage which in terms secures a promissory note for a specified amount may actually be intended to secure future advances to that amount. * * * The omission to state on the face of the mortgage the time when the first advances are to be made is not material. It is sufficient that they are to be made from time to time as the mortgagor may desire during a specified period. The amounts of the several advances and the times when they were actually made and the object of the mortgage may be shown by extrinsic proof, for in such case the proof does not contradict the mortgage or alter its legal operation and effect in any way. Although the deed purports to be in consideration of a definite sum in hand paid at the time, it may be shown by parol evidence that the deed was made to secure advances made and to be made to that extent. * * * Parol evidence is admissible to show the true character of a mortgage and for what purpose and what consideration it was given. Although it is for a definite sum and secures the payment of notes for definite amounts, it may be shown that it is simply one of indemnity." * * *

This language is quoted and approved in Banking Company v. Leonard, 90 Kentucky, 106, 13 Southwestern Reporter, 521, where the authorities bearing on the question are collated and reviewed. See also Frieberg v. Magale, 70 Texas, 119. The rule that the terms of a written contract can not be varied by parol has no application. The mortgage before us did not express all, but only a part, of the terms of the contract, hence there can be no variance. Besides, parol evidence is always admissible to show the real consideration of a contract, even when the same is different from the expressed consideration. Johnson v. Elwen, 59 S. W. Rep., 253. It has been frequently held that it is competent to prove by parol that an instrument in form an absolute conveyance was in fact intended as a mortgage. It was not necessary for the appellants to allege and prove that all the purposes for which the mortgage was given were not fully stated in the mortgage because of some fraud or mistake. There was no fraud or mistake. The parties did exactly what they intended to do, except that, by accident, the note was not executed. The failure to give the note could not affect the intention of the parties to secure the debt. The mortgage having been executed with intention to secure the debt, the appellants, if the facts alleged and offered to be proved by them are true, have a valid lien on the lots in controversy for the debt intended to be secured by the mortgage which is still unpaid. The subsequent change in the form of the evidence of the debt is immaterial. The lien, of course, will not be extended to include any debt not intended at the time of the execution of the mortgage to be covered by it.

The lots were thus described in the mortgage: "All that certain land situated in Hill County, State of Texas, and described as follows: Lots seven (7) and eight (8) in block twenty (20) in the town of Mount Calm, as shown by the map or plat of said town now of record in Hillsboro, to which reference is here made for a more particular description." This description is sufficiently definite, and a foreclosure can not be denied on the ground of uncertainty of description.

The judgment is reversed and the cause remanded.

Reversed and remanded.

S. H. WATSON v. T. M. MIRIKE.

Decided March 6, 1901.

1.—Plea in Abatement—Jurisdiction—Waiver.

A plea in abatement alleging that plaintiff fraudulently stated his claim in the amount for which he sues for the purpose of conferring jurisdiction on the court, is waived where defendant permits three terms of court to pass without calling attention to the plea. Rev. Stats., art. 1269.

2.—Jurisdiction—Amount—Amendment.

The amount of the demend as set up in the amended petition upon which plaintiff goes to trial is the amount in controversy, and this amount prima facie determines the jurisdiction of the court.

3.—Rent Payable in Kind—Measure of Damages.

Where plaintiff sues for rent payable in products, the measure of damages is the market value of such products at the time the rent accrued, with interest to the time of trial.

4.—Landlord and Tenant—Exemption in Lease from Damages for Distraining.

A provision in a lease exempting the landlord, in the event he should distrain for rent, from any claim for damages alleged by the tenant for any cause whatever, is valid, and will exempt the landlord from damages arising from a legal distraint, but not from an illegal and unjust suing out of the writ.

5.—Evidence—Absence of Revenue Stamp.

The Act of Congress of 1898 providing that certain instruments shall not be admissible in evidence unless bearing revenue stamps, applies only to the courts of the United States, and not to the State courts.

Appeal from the County Court of Ellis. Tried below before Hon. J. E. Lancaster.

G. M. Supple, for appellant.

Templeton & Harding, for appellee.

BOOKHOUT, ASSOCIATE JUSTICE.—On September 12, 1899, appellant, S. H. Watson, instituted distress proceedings against appellee, T. M. Mirike, in Justice Court for precinct No. 6, Ellis County, Texas, for $200 rent, consisting of claim of $75 for failure to break stubble land, and $125 for the value of agricultural products appellee failed to deliver in kind, and also for $38.66 worth of advances, all for the year

1899. Appellant alleged as grounds for suing out the distress warrant that $38.66 for advances and $130 of rent for year 1899 was due, and that appellee had removed and was about to remove from the rented land, without appellant's consent, products raised on the rented land. All papers were sent to the County Court of Ellis County by the justice of the peace, and in the County Court of Ellis County, on September 30, 1899, appellant filed his original petition against appellee, asking judgment against him for $200 for rent for year 1899, and also for $38.66 for supplies for year 1899, and setting up the issuance and levy of the distress warrant and existence of landlord's lien on prudects levied on to secure said rent and advances, and asking foreclosure of his landlord's lien to secure said rent and advances. On October 3, 1899, at the October term of court, appellee filed his original answer, setting up a plea to the jurisdiction of the County Court on the ground that appellant had fraudulently stated his claims in excess of $200 for the purpose of conferring jurisdiction on the County Court of Ellis County, and, in the alternative, denying the existence of any of the grounds for distress warrant, and reconvening for $380 actual and $500 exemplary damages for the alleged wrongful and malicious suing out of the distress warrant, and denying that any supplies to make a crop were bought of appellant at all, and claiming a payment of $18.38 on the $38.66 account sued on, made prior to filing this suit.

The property levied on, under agreement of parties, was sold on October 28, 1899, by the constable for $328.95, and of this sum $255.95 was turned over to the clerk of the County Court of Ellis County, and $73 was applied to expenses.

Appellant filed four amended and two supplemental petitions, and appellee one original and three supplemental answers. In each supplemental petition, appellant excepted to appellee's plea to the jurisdiction of the County Court on the ground that the same had not been called to the court's attention for its action or attention within the time required by the statutes of Texas and rules governing county and district courts.

The case was submitted to the jury, and the jury found with appellee on his plea to the jurisdiction of the court. Judgment was accordingly entered dismissing the suit for want of jurisdiction, and ordering the money in the hands of the clerk turned back to appellee, and ordering the constable, who was not a party to the suit, to refund the $73 to appellee paid out by the constable for expenses in gathering the crop, unless the appellant filed a supersedeas bond in manner and time required by law. Appellant filed his supersedeas bond in time required by law, and assigned errors and has perfected his appeal.

1. Appellant's exception to the defendant's plea to the jurisdiction of the court was overruled at the July term, 1900, to which the appellant excepted. Thereupon the case was submitted to the jury, and the jury found in favor of the defendant on his plea to the jurisdiction. Upon this verdict judgment was entered dismissing the suit for want of

jurisdiction, and ordering the money in the hands of the clerk turned back to the defendant. From this judgment plaintiff has prosecuted an appeal to this court.

Appellant's first contention is, that the court erred in overruling his exception to the plea of jurisdiction. This plea was filed October 7, 1899. At the October term the cause was continued under a rule for costs. At the January term, 1900, the cause was continued because of the absence of a witness. At the April term the cause was continued without any order made of record. At the July term the case was called for trial and the appellant presented his exceptions to said plea, based upon the ground that it had been waived by defendant's failure to call the court's attention to the plea and have the same determined at the term of the court at which it was filed. The plea to the jurisdiction of the court alleging that plaintiff has fraudulently stated his cause of action at an amount greater than the amount really due for the purpose of conferring jurisdiction on the court is a plea in abatement, and is required to be filed in due order of pleading. Hoffman v. Loan Co., 85 Texas, 409. The statute requires that such a plea shall be determined during the term of the court at which it is filed, if the business of the court will permit. Rev. Stats., art. 1269. Rule 24 governing the practice in district and county courts requires that such a plea shall be tried at the first term to which the attention of the court shall be called to the same, unless passed by the agreement of parties with the consent of the court, and all such pleas shall be first called and disposed of before the main issue on the merits is tried.

In discussing the time at which a plea of this character should be presented, our Supreme Court, in an opinion delivered by Judge Denman, said: "That the law imposes upon the party relying upon such plea the duty of demanding the action of the court thereon at the time the statute and rule required it to act in the particular case, and that his failure to do so is a waiver thereof." Aldredge v. Webb, 92 Texas, 122. It is clear that by the terms of this statute and the rule, a party relying on such plea is required to call it to the attention of the court during the term of the court at which the same is filed. Had the plea been called to the court's attention at the October term, and the business of the court were such as to prevent its determination at that term, then the court could have made such an order as would have prevented its waiver and authorized its consideration at the next term.

Where a defendant has permitted three terms of the court to pass without calling the court's attention to his plea in abatement, he must be held to have waived the plea. Blum v. Strong, 71 Texas, 328; Machinery Co. v. Smith, 44 S. W. Rep., 592; Aldredge v. Webb, supra. We conclude that the court erred in overruling defendant's exception to the plea in abatement.

2. The amount for which the distress warrant issued was $238.66. The original petition sought a recovery for this sum, claiming that $200

of it was for rent and $38.66 was for money advanced to make a crop on the rented premises. By amendment plaintiff set up additional demands not embraced in the original petition, and also increased the amount sought to be recovered for the items set out in the original petition. The plaintiff had the right to amend in these particulars. Rev. Stats., art. 1188; Rule 12 of Practice in District and County Courts; Boren v. Billington, 82 Texas, 138; Connell v. Chardwell, 11 Texas, 253.

The amount of the demand as set up in the amended petition upon which plaintiff goes to trial is the amount in controversy, and this amount, prima facie, determines the jurisdiction of the court. The court ought not, in submitting the issue raised by defendant's plea to the jurisdiction, to have restricted the jury to the demand set up in the original petition. It is true that, if plaintiff relied upon the distress warrant and levy to preserve his lien, he could only foreclose upon the property levied upon by that writ. His lien was given by statute. The office of a distress warrant is to seize and hold the property in order to preserve the lien. If this were not done, he might lose his lien by the removal of the property from the rented premises, in which event the lien would only remain in force for one month after such removal. Rev. Stats., art. 3237. Cases may arise where a foreclosure could be had without the aid of a distress warrant. Boncier v. Edmonson, 58 Texas, 675.

3. In the seventh assignment of error complaint is made of the fourth paragraph of the court's charge, prescribing the measure of damages. It was shown that the rent was to be paid in cotton, corn, and wheat. The measure of damage in such a case is the market value of these products at the time the rent became due, with legal interest thereon from that date to date of trial. Sedg. on Dam., sec. 319; Taylor on Landl. and Ten., 8 ed., sec. 391; Van Rensellaer v. Jewett, 5 Denio, 135.

4. The defendant plead in reconvention for damages alleged to have been sustained by him by reason of the suing out and levying of the distress warrant. The plaintiff replied to this plea, that he was exempted from all damages arising from the suing of the distress warrant under the following clause of the lease contract: "If he (the landlord) should institute suit for distraint, he is thereby made and declared free from any damage or alleged damages to said crop or crops from whatever cause claimed or alleged by me (the tenant), and from all damages alleged by me in anywise whatever." The appellant asked a charge to the effect that by the terms of the above clause of the lease, plaintiff was exempted from damages arising from the suing out and levy of the distress warrant. The court refused the charge, and to this action appellant has assigned error.

In view of the fact that the construction of this clause of the lease will arise upon another trial, we feel it our duty to consider this assignment. We have not been cited to any authority in which a similar con-

tract has been construed by the courts. It has been held that a public carrier may make a contract which will relieve him from liability for loss or injury to property received for transportation, unless claim be made within a named period after the loss occurs. Westcott v. Fargo, 61 N. Y., 551; Express Co. v. Caldwell, 21 Wall., 264. It has also been held that contracts made between persons, other than carrier and shipper, by which a shorter period than that prescribed by statute of limitations had been fixed within which actions must be brought, or the right to do so barred were valid. Railway v. Trawick, 68 Texas, 314; Greenh. on Pub. Pol., 505, 507. It has been held by the Supreme Court of this State that a stipulation contained in a promissory note authorizing any attorney to appear for the maker in any competent court at any time and confess judgment in favor of the owner or holder of the note, waiving service of citation and copy of petition and agreeing that execution may issue at once on the judgment, was valid and binding. Strasburger v. Heidenheimer, 63 Texas, 5. This decision was rendered previous to the adoption of the statute of 1885 prohibiting a contract of this character. The clause is not against public policy and is such a contract as the parties had a right to make. Our statute expressly recognizes the right of the landlord and tenant to enter into such stipulations and contracts in regard to the rents as they may see proper. Rev. Stats., art. 3249.

While this clause is valid, it is not entitled to the broad construction sought to be placed upon it by the requested charge. By the terms of the lease contract it must have been contemplated by the parties thereto that circumstances might arise which would require a distraint for the purpose of securing the landlord in the payment of his rent. They had in contemplation the circumstances which authorized the suing out of this writ under the statute, and entered into the contract in view of these circumstances. They had in contemplation a distraint in accordance with the statute. If the circumstances arose which authorized a legal distraint, then the tenant agreed to waive all damages arising therefrom. It will not be presumed that they contemplated a waiver of damages arising from an illegal and unjust suing out of the writ. Such a construction would require us to presume the parties took in contemplation the doing of an illegal act. We will not indulge such a presumption.

5. Appellee has cross-assigned error and contends that the trial court erred in admitting in evidence the written lease because it did not have the proper revenue stamps affixed thereto as required by the act of Congress of 1898. The instrument is without a revenue stamp, and was admitted in evidence over defendant's objection. We have not been cited to any decision in which the Act of 1898 has been construed by the appellate courts of this State. The Supreme Court, in construing the act of Congress of 1864 and that of 1866 which stipulated that instruments of this character should not be admissible in evidence until

a legal stamp or stamps were affixed thereto, held that they had reference only to the courts of the United States, and not to State courts. Daily v. Coker, 33 Texas, 815; Shipman v. Fulcrod, 42 Texas, 248. This holding is in accord with the construction placed upon those acts by nearly all the States. Clemens v. Conrad, 19 Mich., 170; Sammons v. Halloway, 21 Mich., 162; Latham v. Smith, 45 Ill., 29; Craig v. Dimock, 47 Ill., 308; Bunker v. Green, 48 Ill., 243; Hanford v. Abrecht, 49 Ill., 146; Bowen v. Byrne, 55 Ill., 467; Wallace v. Cravens, 34 Ind., 534; Duffy v. Hobson, 40 Cal., 240; Hunter v. Cobb, 1 Bush., 239; Spoerer v. Eifler, 1 Heisk., 633; Davis v. Richardson, 45 Miss., 499; Carpenter v. Snelling, 97 Mass., 432; Moore v. Quirk, 105 Mass., 49; Griffin v. Ranney, 35 Conn., 239; Haight v. Grist, 64 N. C., 739; Weltner v. Riggs, 3 W. Va., 445.

The act of Congress of 1898, in so far as it seeks to affect the admissibility of unstamped instruments in evidence, is similar to the act of Congress of 1866, and we think only applies to the courts of the United States, and not to the State courts. Cassidy v. St. Germain (R. I.), 46 Atl. Rep., 35; Knox v. Rossi (Neb.), 57 Pac. Rep., 179.

There is no merit in appellee's cross-assignment.

For the errors indicated the judgment is reversed and cause remanded.

Reversed and remanded.

W. J. CLUTTER v. J. H. DAVIS ET AL.

Decided April 2, 1901.

Public Road—Extent of Easement—Digging Wells on Highway.

The commissioners court has not authority to order or permit the digging of wells in a public road, for the purpose of rendering water convenient for travelers, without the consent of the owner of the land to such additional burden thereon, since the easement for the purposes of a highway does not include such use of the land.

Appeal from Fannin. Tried below before Hon. E. S. Chambers.

Taylor & McGrady, for appellant.

John C. Meade and *Richard B. Semple,* for appellees.

BOOKHOUT, ASSOCIATE JUSTICE.—W. J. Clutter, the appellant, sued J. H. Davis and A. E. Work, appellees, in the District Court of Fannin County, to enjoin them from digging wells and holes in the ground in a public road laid out through plaintiff's land, and to recover damages.

Defendants answered by general demurrer, general denial, and specially, that the wells in the highway are necessary for the convenience and comfort of travelers over said highway; that they were acting under

instructions of the commisioner of Fannin County in digging said wells. A trial resulted in a verdict and judgment for defendants, and plaintiff has appealed.

Conclusions of Fact.—The highway in which the wells were being dug is a first class country road sixty feet wide, extending from the city of Bonham to the city of Ladonia, in Fannin County. This road was laid out in 1887 over the land now owned by plaintiff. The plaintiff subsequently acquired the tract or farm which lies on each side of said road for a distance of 452.5 varas. The land of plaintiff is inclosed on each side of said road. In August, 1899, the road commissioner for that precinct granted to the people of that community the privilege and authority to dig one or more wells on the line of the public road near Mr. Skinner's residence. The authority is in writing, and contains this statement: "I do not know of any damage that could come from digging a well on the line of road, but think it a good thing for the community." Under this authority the defendants, being members of the community, began the digging of two wells in said road, one about 200 yards north of plaintiff's south line, and one about fifty yards further north. These wells are in the public road, and a little west of the traveled part. They were about seven feet in diameter, and when suit was instituted about twelve feet deep. At the time suit was instituted a writ of injunction was granted and served on defendants enjoining them from proceeding until the further order of the court.

In 1895 the Legislature passed an act to create a more efficient road system in Fannin, Robertson, and Kaufman counties, etc. Gen. Laws 1895, p. 203. By the terms of this act the members of the commissioners court are made ex officio road commissioners of their respective districts. It is further made the duty of the county commissioner, when acting as road commissioner, to inform himself of the condition of the public roads of his district and determine what character of work shall be done upon said road and direct the manner of grading, draining, and otherwise improving the same, which direction shall be observed and obeyed by all the road overseers of his district. The defendant Works was the road overseer of this road. Defendant Davis was working under the direction of said Works.

Conclusions of Law.—When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner is not extinguished, but is so qualified that it can only be enjoyed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the public right of way. Jackson v. Hathaway, 15 Johns., 447. Upon the discontinuance of the highway the soil and freehold revert to the owner of the land. Mitchell v. Bass, 26 Texas, 380. The highway is simply an easement or servitude, conferring upon the public only the right of passing over the land of another on

which it is laid out. As an incident of such right, use may be made of the material upon such highway in a reasonable manner for the purpose of making and repairing the highway. The rights acquired by the public are the right of passage and such other uses as are incidental to such right. Lewis on Em. Dom., sec. 589. Is the digging of wells in a suburban highway such a right as is incidental to its maintenance and use as a highway? It has been held that the laying of gas pipes in a suburban highway is an additional easement for which the owner of the fee is entitled to compensation. Sterling's Appeal, 111 Pa. St., 35, 56 Am. Rep., 246; Bloomfield v. Galkins, 62 N. Y., 386.

So, the laying of water pipes in a country highway for the purpose of conducting water to a town is an additional burden for which the owner of the fee is entitled to additional compensation. Van Brunt v. Flatbush, 128 N. Y., 50. It is held that the public has no right as against the owner of the abutting land to divert the water from a spring on a public highway to a public watering trough on the opposite side of said highway. Suffield v. Hathaway, 44 Con., 521, 26 Am. Dec., 483. In this State it has been held that where land was conveyed to a city for street purposes only, the city was not authorized to sink artesian wells upon the land so conveyed for the purpose of supplying the city with water. O'Neal v. City of Sherman, 77 Texas, 182.

We conclude that the digging of wells for the purpose of furnishing water to persons and animals passing over the highway is not a right incidental to the use of the land as a highway. Such use creates an additional easement for which the owner of the fee is entitled to compensation. It follows that the act of the defendants was wrongful in digging said wells, and the trial court erred in rendering judgment in their favor. Under the undisputed facts plaintiff was entitled to judgment. The statute makes it our duty under the facts shown to render such judgment as should have been rendered by the court below. Rev. Stats., art. 1027. It is ordered that the judgment of the trial court be reversed, and judgment will be here rendered for the appellant perpetuating the injunction against appellees.

Reversed and rendered.

Writ of error refused.

W. H. THOMAS, ADMINISTRATOR, v. J. R. HAWPE ET AL.

Decided March 27, 1901.

Probate Court Proceedings—Appeal from Interlocutory Order Approving Account.

An administrator filed an account, styled his final account, showing a balance of money on hand, which account was approved by the court. He did not ask for a final discharge, and no order to that effect was entered. Afterwards he filed another final account which was contested by the heirs, specifying in their contest objections to items stated in such former account, to which the administrator demurred on the ground that the approval of such account by the court was conclusive as to the items therein. Held, that an appeal would not lie

from the order of the court overruling such demurrer, since it was interlocutory and did not finally adjudicate any contested issue between the parties. Rev. Stats., art. 2255.

Appeal from Dallas. Tried below before Hon. Richard Morgan.

R. D. Coughanour and *John L. Henry,* for appellant.

W. P. Martin, for appellees.

BOOKHOUT, ASSOCIATE JUSTICE.—At the May term, 1866, of the County Court of Dallas County, W. H. Thomas was appointed administrator de bonis non of the estate of T. C. Hawpe, deceased, and qualified as such. On September 6, 1877, said admistrator filed an account, styled his final account, showing the condition of said estate, and that there was remaining in his hands $295.15. On October 20, 1877, after notice of the filing of said account had been given, the same was approved by the court and duly recorded, but no discharge was asked or granted.

On November 1, 1899, said administrator filed an account, styled his final account and application for discharge, in which he showed that he paid out on established claims the sum of $177.75 since the approval of the last account, and that there is still remaining in his hands the sum of $126.76.

John R. Hawpe and others, claiming to be heirs at law of said decedent, T. C. Hawpe, contest the approval of said account, and resist the discharge of said administrator, setting out 63 specifications of exception thereto.

On May 18, 1900, said administrator filed demurrers to the specifications, because it appears from said specifications and the exhibits thereto attached that the matters and things therein charged have, each and all of them, been disposed of by a final order of the court made and entered at a former term thereof, from which said final order no appeal was taken, and that now said court has no jurisdiction of the subject matter of this controversy so far as the same has been considered and acted upon in said order.

On June 28, 1900, both of said demurrers were overruled by the court, to which ruling the administrator in open court excepted, and perfected his appeal by giving bond to the District Court, where, on October 16, 1900, the demurrers were presented to that court and resulted in an order overruling both of said demurrers, from which order said administrator has prosecuted an appeal to this court.

A preliminary question which suggests itself to this court in this case is, will an appeal lie from the order complained of?

The statute provides that "any person who may consider himself aggrieved by any decision, order, decree, or judgment of the court, or by any order of the judge thereof, may appeal to the district court as a mat-

ter of right, without bond." Sayles' Civ. Stats. (1897), art. 2255. This statute has been construed as having application only to such decisions, orders, or judgments as at the end of the term would be held conclusive as adjudicative of some controverted question or right, unless set aside by some proceeding appellate or revisory in its nature. Lehman v. Gajusky, 75 Texas, 566. This construction was approved in the later case of Halbert v. Alford, 82 Texas, 297.

The order appealed from in this case is not such an order as at the end of the term, if not set aside or appealed from, would be adjudicative of a controverted issue between the parties. The contestants seek to have certain of the items with which the administrator credited himself disallowed, and to have him charged with property for which it is alleged he has failed to account, and that he be required to restate his account. The contestants challenge items embraced in the account filed and approved in 1877 and certain of the items in the account filed in 1899.

The ground of the demurrer is, that the order made in 1877 approving the account then filed is a final order, and the court has no jurisdiction over the subject matter in so far as the same was considered and acted upon in that order. The county court had jurisdiction of this estate. The order overruling the demurrer did not adjudicate any issue between the parties.

If we were to hold that we had jurisdiction, and that the demurrer was properly overruled, then we see no reason why appellant could not present a special demurrer, and, if the same were overruled by the trial court, appeal from that order.

We conclude that the order complained of is interlocutory in its nature, and not such an order, judgment, or decree as may be appealed from. Scott v. Burton, 6 Texas, 323; Linn v. Arambould, 55 Texas, 611; Railway v. Smith, 58 Texas, 76. The appeal will be dismissed.

Appeal dismissed.

Application for writ of error dismissed by Supreme Court for want of jurisdiction.

TEXAS MIDLAND RAILROAD COMPANY v. E. J. CROWDER ET AL.

Decided March 21, 1901.

1.—Continuance—Surprise—Amendment of Petition.

Where a continuance is applied for on the ground that plaintiff's amended petition, filed just before the trial, set up new matter which was a surprise to the defendant, the court's action in refusing the continuance will not be reviewed in the absence of the original petition from the record.

2.—Same—Diligence to Be Specifically Shown.

Where an application for a continuance is made in order to obtain the testimony of an absent witness, it should specifically set forth the efforts made to procure his testimony, and a general statement that the applicant had caused "diligent search" to be made for the witness is insufficient.

3.—Same—Two Trials at Same Term—Jury.

Where there had been a mistrial, and the court reset the cause for trial again during a week of the term for which no jury had been provided, it was not error to refuse defendant's application for a continuance made on the ground that it was entitled to a jury drawn by the jury commissioners.

4.—Change of Venue—Error in Refusing Not Shown.

Unless the action of the trial court in refusing an application for change of venue is clearly shown to be erroneous, it will not be revised on appeal, the credibility of the person making the application, their means of knowledge and the truth of the facts set forth therein, having been duly attacked, and the issue so formed tried by the court as the statute directs. Rev. Stats., art. 1272.

5.—Jury—Disqualification—Challenge to Array.

It is not sufficient ground for challenge for cause that certain jurors had heard of two former trials of the case and the result thereof, it not being shown that they were influenced by such information. See opinion for case where a challenge to the array of jurors on the ground of a general bias throughout the county was held to have been properly overruled.

6.—Damages for Death—Apportionment—Evidence.

In an action by the wife and children to recover for death of the husband and father, evidence that one of the daughters was afflicted, one limb being paralyzed, and that the father kept a horse and buggy mostly on account of sending her to school, was admissible under article 3037, Revised Statutes, in order to enable the jury to make a proper apportionment of the damages, and if defendant feared such evidence would operate in other ways to its prejudice, it should have requested a charge limiting its effect.

7.—Contributory Negligence—Railway Company—Person Walking on Track.

It is presumed that everyone will act with due care, and negligence will not be imputed to a person because he fails to anticipate culpable negligence on the part of others,—such as the moving of a train down the track on which such person is walking, without any signals or warning of its approach. See case wherein deceased, run over by a trair at a place habitually used by pedestrians, is held not to have been shown guilty of contributory negligence.

8.—Verdict—Damages for Death—Excessiveness.

In actions of damage for the death of a person, the amount of the damages is left to the discretion of the jury, and unless such discretion is abused, the appellate court is not warranted in disturbing the verdict.

Appeal from Delta. Tried below before Hon. L. A. Clark.

Perkins, Gilbert & Perkins, Charles W. Ogden, A. H. Dashiell, and *James Patterson,* for appellants.

Hazelwood & Smith, W S. Bannister, Newman Philips, and *Ed H. Bennett,* for appellees.

RAINEY, ASSOCIATE JUSTICE.—Suit by appellees against appellant to recover damages for the negligent killing of the husband and father of appellees. Defendant answered by general denial and contributory negligence. The cause was finally tried at the June term, 1900, and resulted in a verdict for appellees.

Conclusions of Fact.—Appellant's line of railway passed through the western portion of the corporate limits of the town of Cooper, and its depot and switch yards were within the corporate limits; its main line

was ballasted with "gumbo," which is black dirt, burned for the purpose of making ballast; at the time deceased was killed the streets and spaces between the tracks were muddy; the railway passed through the town at a slight angle from southwest to northeast, but was commonly spoken of as running north to south; the streets of the town run at right angles, and the blocks next to the railway were 300 feet square and the streets 60 feet wide; the yard limits of defendant's road are about 3000 feet long, and the main track runs on the east side of the depot, and there were four side tracks on the west side; Cooper is an incorporated town of about 2000 population; the business portion of the town is about 2000 feet east of appellant's depot; deceased lived on the corner of Geneva and Mattie streets, about 300 feet east of defendant's line of road, and had lived there several years prior to his death; he was 52 years old, six feet high, healthy, and had been married twenty-five years, and left appellee, E. J. Crowder, as his surviving widow, and the balance of the appellees as his children, surviving him at the time of his death, and his father and mother were dead.

Appellant did not keep a switch engine at Cooper, and the local freight trains did their own switching, which was well known to deceased. The regular arriving time of the local freight, going south in the morning, was 6:30 o'clock; on the particular morning in question it arrived a very few minutes late, and placed some local cars of freight at the depot to be unloaded. The conductor and one of the brakemen proceeded to unload this freight, which was a part of their duty, and the engineer, fireman, and one brakeman took the engine and went south from the depot to the yards, to do their switching; they went onto the side track and pulled out some cars and placed two of them on the main line, and then put the others back on the side track, and then came out on the main line and hitched onto the two cars there, and then backed to the depot. It was a bright morning and the sun was shining. The deceased had left his house, about 175 yards distant from the track, going down to the yards, to finish loading a load of bois d'arc posts, and had told the colored man to come on, as he was in a hurry. He walked west to the yard, approaching at an obtuse angle, and it was an open prairie between him and the entire length of the yards; the engine and cars that it was handling being to his left as he approached the track and the depot, and the car that he was going to load being to his right. He reached the track and stepped onto the main track and turned north towards the depot, walking probably on the ends of the ties. The body was found about sixty-seven feet from where Crowder, the deceased, reached the track, and his hat and ax were something like ten steps south of where the body was found, the body having been turned over and dragged by the cars, so that he had traveled approximately thirty or forty feet after getting on the track before he was struck. The track was elevated two or three feet above the ground, and the engine and cars were in plain view from the point where he stepped upon the track, there being nothing to prevent him from seeing it. The train was being

operated about four or five miles an hour, and deceased was walking at an ordinary gait. The engineer was on the right hand side of his engine, as is customary, looking back. The fireman was putting in coal part of the time, and part of the time looking out. Neither of them saw deceased, and the brakeman, whose duty it was to couple the cars, got off the engine at the lower part of the yard to couple on the two cars, and got on the car next to the engine, holding to the ladder on the west side of the car, to ride back to the depot to make the coupling there when the train was reached. Therefore he did not see the deceased. None of the train crew knew that deceased was struck until told by other parties. When deceased was approaching the track the engine and cars were apparently standing at or near the south end of the switch. It is not shown definitely how near he was to the track when the engine started to back down. The wind was blowing from the north. The whistle of the engine was not blown nor the bell ringing. Had a proper lookout been kept, deceased could have been seen by the operatives in time to have averted the injury. The track where deceased was walking when struck had for several years been habitually used by pedestrians, which was known to the management, or would have been known by ordinary care. The testimony showed that deceased had no regular occupation; he was a trader. The only testimony as to his earning capacity was that of the wife, who estimated from what he spent on his family that he earned on an average from $125 to $150 per month.

Opinion.—The appellant complains of the action of the court in overruling its application for continuance for the want of the testimony of E. H. R. Green and W. A. Hope. In the application it is charged that plaintiff, by amended petition filed just before the trial, set up new matter which enlarges the scope of the evidence on a material issue, which surprised appellant, and which new phase of the case it was not able to meet without the testimony of Green, who was absent from the State, and whose testimony could not be obtained in time for a trial at that term of court. The original petition is not incorporated in the record, and we are therefore unable to determine the merits of the alleged surprise. In the absence of the original petition, the presumption will be indulged in favor of the correctness of the ruling refusing the continuance on the ground of surprise. Railway v. Newburn, 60 S. W. Rep., 429.

As to the witness Hope, the application for continuance fails to show the character of diligence used to ascertain the whereabouts of said witness after the return of the subpoena in January showing that he could not be found in Delta ounty, and before the first trial of the cause in June. It is true the application states that after the trial in January it was informed that said witness resided in Hopkins County, and that it caused "diligent search" to be made for him in said county, but that he could not be found. This statement is not definite enough to show the diligence used, and does not meet the requirement of the statute. It

fails to show when the information was received, or what efforts were used to gain correct information as to his locality, and it also fails to show when and how the search for him was made. For aught the application shows, the search may have been made in Hopkins County soon after the January term of court, and several months thereafter intervened before the June term, in which no effort was made to ascertain Hope's whereabouts. The resistance to the motion for continuance shows facts as to the whereabouts of said Hope which warrants the conclusions that if proper diligence had been used by appellant it could have ascertained his residence and secured his testimony in time for the June term. Railway v. Hardin, 62 Texas, 367; Railway v. Aikin, 71 Texas, 373. The diligence shown to have been used after the first and before the second trial in June is not sufficient, especially as prior to that time proper diligence was not shown to have been used to procure Hope's testimony.

Another ground for continuance was urged, and that is, that the jury for the term had been discharged; that the cause had been once tried at that term, resulting in a mistrial, and that defendant was entitled to a trial before a jury drawn by a regular commission appointed for that purpose. The trial court appended to the bill of exceptions taken to the overruling of the application the following explanation, to wit: "On the 19th of June the jury trying this cause the first time during this term were discharged. After they were discharged plaintiff's counsel requested that the case be set down for trial at another day during the term. Counsel for defendant were not present, but the court, in a conversation with the claim agent of defendant who had been present aiding counsel for defendant in looking after their side of the case, stated to the court that he saw no reason why the case should not be again tried at this term. The court then informed plaintiffs that he would set the case down for some day and fix the day later. After this time, but during the third week of court, the case was set for the 9th day of July, over the objection of defendant's counsel. The jury commissioners had at the last (January) term of court selected no jury for any but the first three weeks of court. This term is allowed by law to continue until the business is disposed of, and next term is limited to three weeks. Therefore the court was of the opinion he should dispose of the business this term, and in order to do so it was necessary to try cases both during the fourth and fifth weeks (the fifth being the week this cause was last tried), and there being no jury for such weeks it was necessary to have them summoned during the term."

It was in the discretion of the trial court to reset the case, and as a jury had been demanded and none had been provided for that week, it was in the power of the court to order the sheriff to summon a sufficient number of qualified persons from which a jury could be selected. Telegraph Co. v. Everhart, 32 S. W. Rep., 91; Smith v. Bates, 28 S. W. Rep., 64; Railway v. Vinson, 38 S. W. Rep., 540. The application for continuance was properly overruled.

The appellant assigns as error the action of the court in overruling the challenge to the array of jurors, the grounds for challenge being, in substance, that the jurors were not selected by a jury commission, but were selected and summoned by the sheriff and his deputies. Also that said jurors were summoned by persons pretending to act as sheriff and deputy sheriffs, to whom the required oath had not been administered in the manner required or authorized by law. The motion also set out certain reasons for the challenge, to the effect that this cause was tried at the January term of court and resulted in a mistrial; that it had been tried at a former day of the June term resulting in a mistrial; that the regular jury had been discharged; that the cause had attracted a great deal of attention throughout the county, and many influential citizens had expressed and manifested a deep interest in behalf of the plaintiffs; that the plaintiffs are related to a very large number of the most influential people residing in the county who are interested in the success of plaintiffs; that said relatives live and are known in different portions of the county, so that their influence permeates a large body of the people, and affects a jury summoned specially and solely to try this cause, and thereby prevent the defendant from getting a fair and impartial jury. The trial court heard evidence as to the existence of the alleged reasons for quashing the panel, and which evidence, we think, was sufficient to warrant the court in overruling the challenge.

The appellant's motion for change of venue was overruled, and this is assigned as error. The change of venue was sought on the grounds, first, a combination of influential persons against appellant, and second, the preponderating influence of the relatives and friends of appellee in the county; and that the case had been twice tried before and become so notorious it was impossible to get a fair and impartial jury to try the same. The credibility of the persons making the application, their means of knowledge and the truth of the facts set forth in the application, were duly attacked, and the issue so formed was tried and the motion was overruled.

Article 1272, Revised Statutes, requires the trial court, on the issue thus formed, to grant or refuse the application "as the law and facts shall warrant." Unless the action of the trial court was shown to be clearly wrong, this court will not revise it. Under the facts the court was warranted in refusing the application. Railway v. Nicholson, 57 S. W. Rep., 693.

The court overruled appellant's challenges for cause to ten jurors who each, on examination, testified that they "had heard of the two trials of the case and the results thereof;" and after exhausting all but one of its challenges, appellant had to accept five jurors who made like answers. The fact that these jurors had heard of the two former trials and result thereof did not of itself render them disqualified to try the case. Whether or not they were influenced by such information is not shown by the record, and the court could not so presume. Appellant was not prevented from pursuing the inquiry. In fact the trial court

invited further inquiry by stating to counsel for appellant that each juror might be asked if he had heard how the former jurors stood, and that if any one should answer that he had so heard, the challenge would be sustained.

Over appellant's objection Mrs. Crowder, wife of deceased, was permitted to testify that her daughter Mary, one of the plaintiffs, was afflicted; that her right thigh and leg were paralyzed, and had been from the time she was two years old, from the thigh joint to the end of the foot, and that her father kept a buggy and horse mostly on account of sending her to school. The grounds of objection were that the same was immaterial and irrelevant and calculated to prejudice the rights of defendant. Article 3027, Revised Statutes, provides: "The jury may give such damages as they may think proportionate to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict." Had Crowder lived, the daughter Mary would doubtless, by reason of her affliction, been a greater recipient of pecuniary aid from him than others of his family who were more able to provide for themselves, and the evident object of the statute in authorizing the jury to apportion the amount was that each might receive a share in proportion to the amount of pecuniary aid they would probably have received from the deceased, had he lived; otherwise all beneficiaries would stand on an equal footing and each be entitled to an equal share, regardless of their respective conditions. This being the object of the statute, unless such testimony was admissible the jury would have no basis upon which to predicate a just and equitable division, but would be left without any guide in allotting to each a proportion of the amount of damages assessed. We are of the opinion that the evidence was admissible for the purpose indicated. If the appellant was fearful it would operate prejudicial in other ways, it should have requested the court to have limited the consideration of it by the jury in making the apportionment.

It is urged by various assignments of error that the evidence is not sufficient to support the verdict, the main contention being that deceased was guilty of contributory negligence. The evidence is abundant to show negligence upon the part of the operatives in failing to keep a proper lookout, and in not giving the proper signals under the circumstance. This being true, the question to be determined is, does the evidence conclusively show contributory negligence on the part of the deceased? The natural presumption is that every one will act with due care, and negligence will not be imputed to one if he fails to anticipate culpable negligence on the part of another, as one has the right to assume that the law will be observed by every one. Shearm. & Redf. on Neg., sec. 92.

While the evidence fails to definitely show that Crowder looked and listened before stepping on the track, it is not doing violence to the evidence to assume that he saw the engine and cars at the south end of

the switch, and concluded that they would not be then backed down at that time, or if so, that a proper lookout would be kept, and that proper signals would be given to warn him in time to leave the track to prevent injury. This he had a right to expect, as he was on the track at a place habitually used by pedestrians, and a place where a duty rested on the operatives to use proper care to prevent injury to those who might be on the track.

One witness testified that when Crowder stepped on the track the train was standing on the main track at the south end of the switch. No other witness testifies definitely as to the exact point where the train was when Crowder got on the track. Not only did the operatives fail to keep a lookout and give proper signals, but the train, it seems from the testimony, made little noise as it backed down, one witness stating that it "slipped back on the track." Another who was about the same distance from the train as Crowder said he did not hear the noise from the train. While the evidence is not conclusive as to the absence of contributory negligence, yet it is not so lacking in probative force as to authorize us in holding that it was not sufficient to support the verdict of the jury.

It is urged that the verdict is excessive. In assessing damages in this character of case the amount is left to the discretion of the jury, and, unless such discretion is abused, this court is not warranted in disturbing the verdict. While under the evidence the verdict is large, we do not feel authorized in saying that there was such an abuse of the discretion of the jury as to require a reversal by appellee.

There are various other assignments of error complaining of the court in admitting evidence, in refusing charges requested, etc., which we deem unnecessary to discuss, but will simply say that there is no error requiring a reversal of the judgment. It is therefore affirmed.

Affirmed.

Writ of error refused.

ORIENTAL INVESTMENT COMPANY v. MAGGIE BARCLAY ET AL.

Decided March 23, 1901.

1.—Landlord and Tenant—Privity—Simulated Lease.

The rule that the servant of a tenant is in privity with the tenant and bound by the terms of the contract between the landlord and tenant applies where there is an actual and bona fide contract of tenancy, but not where such contract is merely a sham lease designed and intended to protect the landlord from liability, and the real relation between the landlord and the ostensible tenant or lessee is that of principal and agent.

2.—Lease of Hotel as Fraudulent Devise—Corporation as Lessee.

See evidence held sufficient to show that a lease of a hotel, executed by its owner, a Missouri corporation, to a Texas corporation, was merely a sham and devise to protect the former against liability, the lessee corporation having been organized by and from among stockholders of the former corporation, no part of its capital stock having ever been paid in, and its management of the hotel being in realty that of the owning corporation.

3.—Master and Servant—Injury to Hotel Employes—Defective Elevator.

See evidence of negligence and a simulated relation of lessor and lessee under which a corporation that owned a hotel was held liable for injuries to servants therein, ostensibly employed by the lessee corporation,— such injuries resulting from defects in an elevator and its improper operation.

4.—Same—Estoppel—Corporation.

The fact that plaintiffs, who were hotel employes, had accepted employment from a corporation which had leased the hotel did not estop them from denying its legal existence and ostensible relation as lessee, where the lessor corporation was in reality still operating the hotel, and the lease was simulated and a mere device to conceal the relation between the lessor and lessee.

5.—Parol Evidence Varying Written Instrument—Fraud.

The rule that the terms of a written instrument can not be varied by parol evidence does not apply where it is charged that such instrument is simulated and fraudulent.

6.—Remarks of Counsel in Objecting to Evidence.

Defendant having offered in evidence a written lease executed by it to another corporation, counsel for plaintiff, objecting to its introduction, stated in the hearing of the jury that it was a self-serving document prepared for use in this case, and for the purpose of denying the relation of principal and agent between the two corporations. The court admitted the instrument in evidence, and defendants did not request any charge to have the jury disregard the remarks, and nothing in the record shows that the jury were influenced thereby. Held, that the remarks did not constitute reversible error.

7.—Special Issues—Verdict Held Responsive.

Where the court submitted to the jury as one of the issues, the question whether a certain corporation was organized in good faith to be a distinct and separate corporation from a named investment company, and was at a given time in good faith running and operating a certain hotel as an independent corporation and bona fide lessee of the investment company, for and in its own behalf and interest, and not for and in behalf of the investment company, and the jury answered that such corporation was not organized in good faith and was not at the time named running the hotel in its own behalf "but was acting as agent for the investment company," such answer was responsive and proper, as the interrogatories submitted the question of agency, and such answer was not, as to the matter of agency, a conclusion of law.

8.—Same—Findings in Conflict and not Responsive—Correction.

Where the one issue of negligence on the part of defendant was submitted to the jury by six interrogatories, and they answered four of them in plaintiff's favor and two in defendant's favor, such answers conflicting with each other, such a return of verdict was not responsive to the issues, and it was proper for the court to call the jury's attention thereto and to send them back for further deliberation.

Appeal from Dallas. Tried below before Hon. W. J. J. Smith.

Harris, Etheridge & Knight, for appellant.

Parks & Crawford, Carden & Carden, and *Moroney & Love,* for appellees.

BOOKHOUT, ASSOCIATE JUSTICE.—On January 26, 1894, appellees, Maggie Sline, Maggie Barclay, and Alma Semond, sustained injuries by reason of the falling of the freight elevator in use at the Oriental Hotel, in the city of Dallas, and they thereafter instituted their several suits in the District Court of the Fourteenth Judicial District, Dallas

County, against The Oriental, a corporation, organized under and by virtue of the laws of the State of Texas, to recover damages therefor, and thereafter, by amendment, joined as defendant in said suit the appellant, a corporation duly incorporated under and by virtue of the laws of Missouri.

On September 4, 1897, appellees dismissed their suits as to The Oriental, the Texas corporation. On October 12, 1897, appellees severally filed their amended original petition upon which this case was tried. Appellant was made sole defendant by appellees' said amended original petition. On October 12, 1897, appellant filed its amended answer consisting of general and special exceptions, general denial, etc. On October 27, 1897, all three of the cases were, by agreement, consolidated and tried before a jury, on submission of special issues. Appellant's motion for new trial having been overruled, it gave notice of and perfected its appeal. On December 7, 1897, all parties hereto agreed, in writing, that all three of the cases should be submitted on appeal upon one statement of facts, one assignment of errors, one brief, and one transcript.

We take from the brief of appellant the following statement as to the issue and pleadings: "For the purpose of this appeal, it is conceded that the evidence, while conflicting, is sufficient to support the verdict, finding that the appellees sustained injuries through the negligent construction and operation of the freight elevator, as claimed by them, to the amount of their respective recoveries, and the only issues that will be presented on this appeal, save certain errors assigned in respect to the giving and refusal of charges and in the receipt of the verdict, relate to the responsibility of the appellant therefor, it being claimed by the appellant, in substance, that The Oriental was operating said hotel and elevator at the time of the accident under a valid lease from the appellant, which bound the lessee to repair, and that the appellees were all in the employ of said The Oriental at the time of receiving their injuries; and it being claimed in substance by the appellees, on the other hand, that the aforesaid lease was fraudulent and void, and did not express the real relations between The Oriental and appellant, and that in fact the real relation between them was that of principal and agent."

The only portion of the plaintiff's pleading material and necessary to be considered with reference to the issue as to the appellant's responsibility is the second count. This pleading it not sworn to. It sets up the existence of the two corporations, the Oriental Investment Company and The Oriental, and states the purposes for which each was incorporated, and then alleges the lease from the one to the other, and undertakes to avoid the same upon various grounds, which may be thus analyzed and numbered:

1. On January 26, 1894, the Investment Company was the owner of the hotel and of the land upon which it was situated, and on that date and prior thereto, the Investment Company was in possession of and

operating same as a public hotel. That on said date plaintiffs were in the employ of the defendant as chambermaids in said hotel. Then, after setting forth that the elevator of the hotel was out of repair and negligently operated, thereby causing the injuries complained of, said pleading proceeds to aver that on November 29, 1892, the Investment Company bought and took possession of said property for the purpose of running the same as a hotel.

2. That said property was worth $600,000, and the furniture and fixtures were worth $150,000, and that the expense of operating the hotel on January 26, 1894, was about $40,000 per month, and required a capital of $150,000 to operate same.

3. That about November 29, 1892, the Investment Company filed its charter with the Secretary of the State of Missouri, by which it became duly incorporated, as a private corporation, under the name of the Oriental Investment Company, with Wm. F. Nolker, Louis Brinckwirth, Frank Roseman, Hermann A. Haeussler, Elizabeth Schneider, Marquard Forster, Moses Greenwood, Jr., Ferdinand Herold, August Gehner, and Adolphus Busch as incorporators, with a capital stock of $250,000, divided into 2500 shares of $100 each, and that the purpose, as stated in the charter was, "To purchase, own, and rent buildings erected for pecuniary profit and gain, as provided for in chapter 42, article 8, of the laws of the State of Missouri." That the board of directors named in the charter for the first year were: Marquard Forster, Ferdinand Harold, Adolphus Busch, Hermann A. Haeussler, and Wm. F. Nolker, all of whom were citizens of the State of Missouri.

4. That on the 30th day of September, 1893, a corporation, known as The Oriental, was organized under the laws of the State of Texas, with Walter J. Alden, Adolphus Busch, Louis Reichenstein, Arthur T. Stevens, Louis Brinckwirth, August Gehner, and Hermann A. Haeussler, as incorporators and pretended stockholders, the charter setting forth that Reichenstein, Stevens, and Alden were citizens of Dallas, Texas, and that the purpose of the corporation was, "the establishment and maintenance of a hotel," Reichenstein, Stevens, Alden, Busch, Brinckwirth, Gehner, and Haeussler being named in the charter as the directors for the first year, and the capital stock of The Oriental being only $10,000, and divided into 100 shares of $100 per share. That as soon as the Investment Company got The Oriental organized, it pretended to put the same in possession of said property under a pretended lease, and that defendant claims that The Oriental was operating said hotel as lessee under said pretended lease on January 26, 1894.

5. That if The Oriental was operating said hotel as lessee, at the date of the injury, still the Investment Company would be liable in that, as a matter of fact, it was agreed between the Investment Company and The Oriental that the former should keep said property in repair, and that the Investment Company, prior to and since January 26, 1894, has made repairs, changes, and alterations to the extent of about $60,000,

paying for the same out of its own funds, and that The Oriental paid no increased rent by reason thereof, and that The Oriental was to act as the agent of the Investment Company against liability in the matter of running the hotel, and that Reichenstein, Alden, and Stevens, at the instance of the Oriental Investment Company, subscribed to the charter of The Oriental for the purpose of aiding the Investment Company in the formation of The Oriental for the Investment Company's sole use and benefit, they not having any real interest in The Oriental.

6. That it was agreed, when Reichenstein, Alden, and Stevens subscribed the charter of The Oriental and took stock therein, that they were never to pay for their stock, or to any interest in the corporation, and were neither to make nor lose by reason of being incorporators of The Oriental.

7. That all the stockholders of The Oriental, except Reichenstein, Alden, and Stevens, were also stockholders of the Investment Company; and that they permitted the use of their names for the Investment Company's use and benefit, and have acted solely as dummies and figure-heads.

8. That when The Oriental was organized, Stevens, Reichenstein, and Alden were employes of Busch, who was a director and one of the principal stockholders of the Investment Company, and that the Investment Company was desirious of running the hotel and evading responsibility for the liabilities incident thereto, and that for this purpose they organized The Oriental, the Texas corporation, procuring Reichenstein, Alden, and Stevens to become straw incorporators therein.

9. That in pursuance of such understanding, Alden, Reichenstein, and Stevens became dummy stockholders in The Oriental, owning no interest therein.

10. That when The Oriental was organized, it issued all of its $10,000 capital stock to the stockholders of the Investment Company, except three shares which were caused by the Investment Company to be issued to Stevens, Alden, and Reichenstein, and that this was done after the accident to the plaintiffs, and that said last three named stockholders never paid or expected to pay any consideration for the stock issued to them, and that the Investment Company has ever since the organization of The Oriental, owned all of its capital stock, and that The Oriental is only another name for the Investment Company.

11. That Alden has been pretending to act as manager of The Oriental, but in fact was acting as manager of the Investment Company.

12. That Busch, Brinckwirth, Gehner, and Haeussler, subscribers to the charter of The Oriental, then owned a controlling interest in the Investment Company, and that their acts in the matter of organizing The Oriental was for the sole benefit of the Investment Company.

13. That the directors of The Oriental never had, since its organization, a meeting at which either Alden, Stevens, or Reichenstein attended, and that the last named parties never had anything to do with the man-

agement of The Oriental, except that Alden acted as general manager for the Oriental Investment Company.

14. That the Investment Company, since the organization of The Oriental, has superintended and operated said hotel, having the management and control thereof, and that all acts of The Oriental have been those of the Investment Company, and that the pretended possession of The Oriental was in fact that of the Investment Company.

15. That the capital stock of The Oriental is wholly inadequate for the operation and repair of the hotel, as the Investment Company well knew when the lease was made; and that the Investment Company has since September 30, 1893, furnished the provisions and funds necessary to operate said hotel, and has received and appropriated the profits arising from the operation thereof.

16. That no part of the capital stock of The Oriental was ever paid, and no stock issued until after January 26, 1894, The Oriental being without capital and insolvent, and the Investment Company being abundantly solvent.

17. That the time the possession of the hotel was delivered to The Oriental under the lease, the elevator was an existing nuisance upon the premises, and that knowing the same, it deceived The Oriental in representing to it that the elevator was in good repair.

18. That if The Oriental was ever in possession of the hotel, operating under a lease, the same was fraudulent, because not executed until after the plaintiffs had been injured, and fraudulently antedated for the purpose of attempting to shield the Investment Company from liability.

19. That the lease was never intended by the parties thereto to operate as such, and that The Oriental was the mere instrument, agent, and servant of the Investment Company.

20. That the acts of Reichenstein, Alden, and Stevens in assisting in incorporating The Oriental were for the sole purpose of aiding the Investment Company.

The issues submitted to the jury and the answers thereto are as follows:

"1. Did the Oriental Investment Company, the Missouri corporation, cause The Oriental, the Texas corporation, to be organized for the purpose of running and operating the Oriental Hotel in the city of Dallas, for and on behalf of the said Oriental Investment Company, but in the name of said The Oriental; and was said The Oriental so running and operating the said Oriental Hotel for and on behalf of said Oriental Investment Company, but in the name of the said The Oriental, from the time the said Oriental Hotel was opened in October, 1893, up to and including the 26th day of January, 1894, the time when the elevator fell?" Answer: "Yes; it was organized to be run in the interest of Oriental Investment Company, but in the name of The Oriental up to and including the time the elevator fell."

"2. Was The Oriental, the Texas corporation, organized in good faith to be a separate, distinct, and independent corporation from the said Oriental Investment Company, and was said The Oriental, on the 26th day of January, 1894, at the time the elevator fell, in good faith running and operating said Oriental Hotel as an independent corporation and bona fide lessee of said Oriental Investment Company for and on its own behalf, and not for and on behalf of said Oriental Investment Company?" Answer: "No; the Texas corporation was not organized in good faith at the time the elevator fell. The Oriental was not running in its own behalf but was acting as agent for the Oriental Investment Company."

"If you find in the negative on the issue submitted in paragraph number 1, above, or if you find in the affirmative on the issues in paragraph number 2, above. then you will go no further, but in each of said three causes, after writing your findings upon said issues above submitted, return the following verdict: 'We the jury find for defendant, Oriental Investment Company.'

"But if you find in the affirmative on the issues submitted in paragraph number 1, above, and in the negative on the issues submitted in paragraph number 2, above, then the following additional issues are submitted to you for your determination from the evidence before you:

"3. Was the elevator in the Oriental Hotel, which fell on the 26th day of January, 1894, at the time it so fell, defective or out of repair in the particulars or any of them alleged by plaintiffs in their petition?" Answer: "Yes."

"4. If you answer that said elevator was so defective or out of repair, were such defects, if any, or want of repair, if any, known to the servants, if any, of The Oriental, or of the Oriental Investment Company having said elevator in their charge or control?" Answer: "No."

"5. Could the Oriental Investment Company or The Oriental, by the use of ordinary care and diligence prior to the time said elevator fell, have discovered such defects, if any, or said want of repair, if any? By 'ordinary care and diligence' is meant such care and diligence as a person of ordinary care and diligence would exercise under like circumstances." Answer: "Yes."

"6. Was the fall of said elevator on the 26th day of January, 1894, proximately caused by any defects, if any, or want of repair, if any, then existing in said elevator?" Answer: "It was."

"7. Did the fall of said elevator proximately result from the failure, if any, of Oriental Investment Company or of The Oriental to use ordinary care and diligence, as hereinbefore defined, to discover and remedy such defects, if any, or want of repair, if any, existing in said elevator?" Answer: "Yes."

"8. Were all the plaintiffs, at the time said elevator so fell, upon the same with a quantity of hotel linen, carrying the same from the linen room of said hotel to their respective rooms on another floor of the hotel in the regular discharge of their duties as chambermaids of said hotel?"

Answer: "Yes; they were carrying linen in the discharge of their duties."

"9. Did the rules of said hotel prohibit plaintiffs, when carrying hotel linens from floor to floor, from riding on said elevator at the time it so fell, and were said rules known to the plaintiffs and each of them, and if not so known could such rules, if any, have been known by plaintiffs by the use of ordinary care and diligence on their part, as hereinbefore defined?" Answer: "No, we think not; they were acting under directions of housekeeper."

"10. Was W. J. Alden managing officer in charge of said hotel on the 26th day of January, 1894, at the time the elevator so fell, and prior thereto?" Answer: "He was."

"11. Did W. J. Alden authorize and direct any of the plaintiffs to ride upon said elevator when carrying hotel linens from floor to floor of said hotel in discharge of their duties as chambermaids in said hotel, and if any of the plaintiffs, which of them?" Answer: "No, he did not direct either of them."

"12. Did the housekeeper of said hotel, on the 26th day of January, 1894, and prior thereto, have charge and control of plaintiffs as chambermaids in said hotel, and did she have power and authority to employ and discharge them as chambermaids, and to command, direct, and control them in the performance of their duties as chambermaids?" Answer: "She did."

"13. Did such housekeeper direct any of the plaintiffs, and, if any, which of the plaintiffs, to ride upon said elevator when carrying hotel linens from floor to floor of said hotel in the discharge of their duties as chambermaids in said hotel?" Answer: "Yes; Maggie Sline, Maggie Barclay, and Alma Semond."

"14. Were said plaintiffs upon said elevator at the time it so fell on the 26th day of January, 1894, each with hotel linens in obedience to the directions given to them at the time by the housekeeper of said hotel, and did such housekeeper have authority to direct them so to use said elevator?" Answer: "Yes; they were upon said elevator at the time it fell, on the 26th day of January, 1894, each with hotel linens in obedience to directions given by housekeeper. She had authority over the elevator in her department."

"15. If you find that said elevator was defective or out of repair when it so fell on the 26th day of January, 1894, then did any of the plaintiffs, and, if any of them, which one or ones, know of such defects, if any, or want of repair, if any, or could plaintiffs, or either of them, and if either of them, which one or ones, have known by the use of ordinary care and diligence, as hereinbefore defined, of such defects, if any, or want of repairs, if any, in said elevator?" Answer: "No, they could not have known it."

"16. Was Charlie Vignes, the operator of said elevator, at the time it fell on January 26, 1894, a reasonably competent and careful person for that employment, and was he in the exercise of ordinary care and

diligence, as hereinbefore defined?" Answer: "We find that Charlie Vignes, at the time that the elevator fell, was not a competent person for that employment; and while the accident was not caused directly by his negligence, yet he did not exercise the ordinary care and diligence that a competent and skillful person would have done."

"17. If you answer that Charlie Vignes was not a reasonably competent and careful person to operate said elevator, then was this known to The Oriental, or the Oriental Investment Company, or could it have been to them, or either of them, by the use of ordinary care and diligence as hereinbefore defined?" Answer: "They could have known it through their agent W. J. Alden."

"18. Did the Oriental Investment Company or The Oriental use ordinary care and diligence, as hereinbefore defined, to secure a reasonably competent and careful elevator operator in the selection and employment of Charlie Vignes as such elevator operator?" Answer: "No, they did not."

"19. If you find that Charlie Vignes was not a reasonably competent and careful elevator operator, then did plaintiffs, or either of them, (and if either of them, which one or ones), know, or could they have known by the exercise of ordinary care and diligence, as hereinbefore defined, that he was not a reasonably competent and careful operator of said elevator?" Answer: "No, they could not have known."

"20. Did the fall of said elevator result from the failure, if any, of Charlie Vignes to use ordinary care and diligence, as hereinbefore defined, in the operation of said elevator, at the time or just before it fell on the 26th day of January, 1894?" Answer: "See our answer to paragraph 16."

"21. Did plaintiff, Maggie Sline, receive the injuries, or any of them, complained of in her petition at the time said elevator fell on the 26th day of January, 1894, and were such injuries, if any, proximately caused and did they proximately result from the failure, if any, of the Oriental Investment Company or The Oriental to use ordinary care and diligence, as hereinbefore defined, to discover the defects, if any, or want of repair, if any, in said elevator?" Answer: "Yes; she received her injuries when the elevator fell, and they did proximately result by the failure of Oriental Investment Company, through its agent, W. J. Alden, to use ordinary care to discover the defects in machinery, and employ proper person to operate elevator."

"22. Is it reasonably certain that the injuries, or any of them, of Maggie Sline, so received, if any, are permanent?" Answer: "Yes."

"23. What amount would, in your judgment, be a fair compensation to Maggie Sline for the injuries and damages, if any, sutained by her in the fall of said elevator, and complained of in her petition, taking into estimation the physical pain and mental suffering of Maggie Sline, her impaired capacity, if any, to earn a living, and the permanency of her injuries, if it is reasonably certain that they are permanent, and her

reasonable doctor bills incurred by said injuries?" Answer: "Six thousand dollars."

[Like issues to those contained in Nos. 21, 22, and 23 were submitted with reference to plaintiffs Maggie Barclay and Alma Semond, and were ansered by the jury in like manner.]

"30. Did the Union Casualty Company, of St. Louis, on or about the 15th day of September, 1897, for The Oriental, pay to the plaintiffs, or any of them, and, if any of them, which one or ones, any sum of money, and, if any, how much, in satisfaction of their or any of their claims or suits against The Oriental for damages for the aleged injuries here sued for? And if so, did such plaintiff or plaintiffs, if any of them, receive the same in complete satisfaction or partial satisfaction of either?"

Answer: "They received nothing."

"31. Was there any contract, agreement, or understanding between plaintiffs, or any one of them (and, if any, specify one or ones), and Parks and Bradford, that they or either of the plaintiffs are to receive any part of the $4500 paid to Parks & Bradford?" Answer: "There was no such an agreement."

"32. You are the exclusive judges of the credibility of the witnesses and the weight of the evidence."

Issues submitted upon the request of the defendant:

"1. Did The Oriental, the Texas corporation, go into the possession of the hotel under the lease from the Oriental Investment Company and conduct the business of running a hotel for its own account?" Answer: "We did not so find."

"2. Did the party operating the hotel in the selection of the elevator and machinery and in keeping of the same in repair, employ the care that would be exercised by a person of ordinary care and prudence?" Answer: "We are of the opinion that they did not."

"3. Was the payment of the money to Parks & Bradford by the Union Casualty Company for the account of The Oriental made for the benefit of the plaintiffs?" Answer: "The plaintiffs did not receive any money."

"Was the subscription of the capital stock of The Oriental made and signed on October 10, 1893, as shown by record read in evidence?" Answer: "Yes, it was shown in evidence."

"And was lease read in evidence made, executed, and delivered before November 1, 1893?" Answer: "Yes, it was."

"And was the contract between Oriental and W. J. Alden read in evidence made, executed, and delivered before November 1, 1893?" Answer: "Yes, it was."

"And were all the books and papers of the Oriental Investment Company at Dallas, Texas, sent to the home office at St. Louis before January 1, 1894, and a full settlement of all matters between Alden and Oriental on one part and the Oriental Investment Company on the other had before January 1, 1894?" Answer: "Yes, it was as shown by the evidence."

When the findings were returned into court, the following additional instruction was given:

"Gentlemen of the Jury: Your attention is called to the fact that there is a conflict between your answers to the issues submitted in paragraph number 2 of the issues submitted at the request of defendant, on the one hand, and your answers to the issues submitted in paragraphs numbered 5 and 6, first submitted by the court, on the other hand.

"And also that there is a conflict between your answers to the issues submitted in paragraph number 7, on the one hand, and your answers to the issues submitted in paragraphs numbered 5 and 6 on the other hand."

Whereupon the jury again retired and returned into court their findings so changed as to make their answer "Yes" to the seventh issue submitted by the court in the general charge, whereas their previous answer thereto had been "No;" and their answer to the second issue submitted by the court, at the instance of appellant, was made to read: "We are of opinion that they did not," whereas, the previous answer of the jury thereto, was: "We are of the opinion that they did." We adopt as our conclusions of fact the findings of the jury and the additional facts set out in the opinion.

1. The first assignment of error presented by appellant reads: "The court erred in overruling defendant's ninth special exception, excepting to all that part of said count of said petition which alleged that while the lease from the defendant to The Oriental purported to bind said Oriental to keep said hotel in repair, yet as a matter of fact it was understood between said Oriental and defendant that the latter should keep said hotel in repair, because that said petition shows that said lease contract was in writing, and it is not alleged that said understanding so sought to be set up by the plaintiffs was omitted from said lease by the mistake, fraud, accident, or the deceit of either party thereto. The overruling of said exception was error because the plaintiffs, having voluntarily accepted employment from The Oriental, were in no position to question the ostensible relations existing between The Oriental and the Oriental Investment Company."

The petition charged, in effect, that the hotel was being operated by the Orinetal Investment Company at the time of the accident; while the defendant investment company claims that it was being operated at that time by The Oriental under a lease from the Investment Company, which lease bound The Oriental to keep the premises in repair, and for that reason the Investment Company was not liable. In reply to this defense the plaintiffs alleged that if there was such a lease, it was simulated and a mere sham, designed and intended to protect appellant from liability, and in truth and in fact it was the understanding that appellant was to keep the property in repair. It is charged by the plaintiffs that it was operated by The Oriental as the agent of appellant, and the lease was but a device designed and intended to conceal the true relation of

appellant, that of principal, in the operation of said hotel. If these allegations are true, the appellant could not shield itself from liability by setting up the lease. The relation which the parties sustained under the allegations made by plaintiffs was that of principal and agent, and not lessor and lessee. The rule invoked by the appellant, that the servant of a tenant is in privity with the tenant and bound by the terms of the contract between the landlord and tenant, is conceded to be sound where there is an actual and bona fide contract between the parties. Such was the case of the East Line Railroad Company v. Culberson, 72 Texas, 375. But this rule can not apply here, if, as alleged, the lease was a sham intended to conceal the true relation between the parties.

It is further contended under said assignment that, the lease being in writing, its terms can not be varied by parol evidence. This rule can not be invoked to prevent an attack upon a written instrument where it is charged that such instrument is simulated and fraudulent. The pleadings of plaintiffs further alleged as a fact that the appellant did make repairs on the premises during the term covered by the lease. The court did not err in overruling the exception to the petition. In support of the principles above announced, see Robinson v. State, 24 Texas, 152; Railway v. Warner, 32 S. W. Rep., 868; Smith v. Smith, 81 Texas, 45; Labadie v. Hawley, 61 Texas, 169; Davis v. Bingham, 46 S. W. Rep., 840; Johnson v. L. C. L. Co., 29 Pac. Rep., 451; Burkeson v. Railway, 45 S. W. Rep., 1119; Poor v. Sears, 28 N. E. Rep., 1046.

These remarks also dispose of the ninth and tenth and twenty-second assignments of error adversely to appellant.

2. Appellant's seventeenth and thirteenth assignments are grouped, and under these appellant presents twenty-eight propositions, some of which announce correct propositions of law, but which are not applicable to the case as made. It is contended that the court erred in refusing a peremptory instruction to the jury to return a verdict for defendant because there was no evidence before them tending to show that The Oriental, the Texas corporation, was the agent of the St. Louis corporation, the Oriental Investment Company. In 1890 the Oriental Hotel Company, a Texas corporation, built and erected what is known as the Oriental Hotel, in the city of Dallas. This company executed to the St. Louis Trust Company a trust deed on the property to secure its bonds to the amount of $250,000. The deed of trust was foreclosed, and the property was bought in by Herman A. Haeussler, of St. Louis, for the bondholders. In March, 1892, the Oriental Investment Company was incorporated under the laws of Missouri with an authorized capital of $250,000, and with authority "to purchase, own, and rent buildings erected for pecuniary profit and gain." The late bondholders subscribed for this stock in proporition to their respective interests. In November, 1892, the hotel was conveyed by Haeussler to the Investment Company for the consideration of $125,000, which was credited on the stock subscriptions, the remaining 50 per cent being subject to call. About June, 1893, the Investment Company em-

ployed W. J. Alden, an experienced hotel man, to assist in furnishing the house, the expense to be paid by the Investment Company by calls on the unpaid capital stock.

At a meeting of the board of directors of the Investment Company, held on September 22, 1893, it was determined to organize a new company under the laws of Texas to operate the hotel, with Mr. Allen as manager and secretary, and that each stockholder take stock not to exceed 5 per cent of his stock in the Invertment Company. A new company was organized under the laws of Texas with a capital stock of $10,000. As all the stockholders of the Investment Company were citizens of Missouri, and as the laws of Texas required that a Texas corporation should have resident stockholders, Alden, the manager, and Stevens and Reichenstein, Dallas employes of the Anheuser-Busch Brewing Association, of St. Louis, were selected as the Texas stockholders. Adolphus Busch was president of said brewing association, and director and one of the principal stockholders in said Investment Company. Alden, Stevens, and Reichenstein each subscribed for one share of stock, but they never paid anything on their subscriptions. A charter was prepared for The Oriental and filed with the Secretary of State on October 4, 1893.

A number of the stockholders had not agreed to the proposed arrangement. Haeussler, nevertheless, signed their names to the subscription of the stock of The Oriental, intending to afterwards secure their ratification, which was done, but when does not clearly appear. Only 20 per cent of the capital stock, amounting to $2000, was paid on the stock of The Oriental, and this was paid by the secretary and treasurer of the Investment Company by check for that amount drawn by him on the funds of the Investment Company. Alden, Stevens, and Reichenstein paid nothing on their stock, but the 20 per cent was deducted from the pro rata subscription of Busch made in his own name. A contract was executed between W. J. Alden and The Oriental, dated October 10, 1893, by which he was made its manager at a salary of $3000 per annum and 10 per cent of the net earnings. The lease from the Investment Company to The Oriental bears date October 10, 1893, and is signed by Marquard Forster, president, and H. A. Haeussler, secretary of the Investment Company, and Adolphus Busch, president, L. Reichenstein, vice-president, and W. J. Alden, secretary and manages of The Oriental. The lease was for two years and eight months from October 1, 1893, the lessee to pay rent at $1500 a month, payable monthly, and keep the property in repair, and pay all taxes and insurance on the property. The lease does not apppear to have been fully signed or delivered until about October 14, 1893, and was first reported to the board of directors of the Investment Company on December 16, 1893. The hotel was furnished and equipped, and on October 9, 1893, was opened for business by the Investment Company, and it continued in possession and control of the property, with W. J. Alden as manager, up to the time the lease to The Oriental was fully executed and delivered. The lease to The Oriental was never recorded. There was no visible change of management or con-

trol. Alden, who had been manager for the Investment Company, remained as manager of The Oriental. No changes were made in the employes, except such as occurred from time to time in the ordinary course of business. No employes, other than Alden and Mrs. Hazen, the housekeeper, appear to have been notified of any change of possession or management. Alden retained the books of the Investment Company and continud to represent it. at least to whatever extent was necessary, until some time in January, 1894. The Investment Company does not appear to have had any other representatives in Dallas. The hotel was the only property the Investment Company owned. It is undisputed that plaintiff Maggie Sline was employed on September 23, 1893, and that plaintiff Maggie Barclay was employed on October 9, 1893. They were then employed at $15 per month, which agreement was never changed, and the only contract of employment they ever had was with appellant, the Investment Company. They never heard of The Oriental, or the lease, until after the accident. Plaintiff Alma Semond was employed October 24, 1893, after the execution of the alleged lease, but with no knowledge of its existence. A large number of employes, including all of the plaintiffs, who worked in the hotel after October 10, 1893, and before and after the accident, testified in substance that they were employed and worked for the Oriental Investment Company, the St. Louis Company, the company that owned the property, etc.

There is evidence tending to show that it required experience to run the elevator; that Vignes, the elevator operator, was wholly inexperienced; that he did the best he knew, but, on account of his incompetency he did not operate the elevator properly, and this was one of the proximate causes of the accident. The evidence also tends to show that his incompetency ought to have been known by appellant or Alden before the accident occurred. The evidence also tends to show that the elevator itself was in a dangerous condition, which ought to have been known by appellant, or Alden, before the accident, and this was one of the concurring proximate causes of the accident.

The Oriental never had a dollar of paid up capital except what the Investment Company furnished out of its own treasury, nor did it have a dollar or a cent of any kind when it claimed it began to operate the hotel, October 10, 1893. Not a single subscriber to its stock had paid a cent. Where the money came from to pay for its charter, which was filed on October 4, 1893, does not appear. On October 14, 1893, the Investment Company sent from St. Louis $2000 to The Oriental. This was to pay 20 per cent of the stock subscription. It was the Investment Company's money. On April 26, 1894, there was a meeting at Dallas of the directors of The Oriental, and the proceedings were had that made the entire capital paid up, as one witness puts it. These "proceedings" consisted of a mere statement that The Oriental had made $8000 in profits, in the face of the fact that it had not up to that time paid its rent with regularity or when due. A new corporation, the Oriental Hotel Association, was formed in March, 1896, under the laws of Texas, with an

authorized capital of $150,000. The Investment Company had The Oriental join in conveying to the Oriental Hotel Association all their assets, real and personal, including said hotel and its appurtenances. The hotel association assumed the $10,000 liabilities of The Oriental to the Investment Company, and in payment issued to the Investment Company $10,000 in stock of the hotel association. The hotel association issued to the Investment Company $300,000 in first mortgage bonds, which are now held by the Investment Company, except a portion which it has hypothecated to secure money borrowed to pay off mechanics' liens which had been established against the property. The consideration of the entire transfer from both companies was stated at $450,000, consisting of $150,000 in stock and $300,000 bonds, and $140,000 of the stock was issued direct to the Investment Company, the remaining $10,000 being also issued to the Investment Company in payment of the $10,000 debt of The Oriental which the hotel association had assumed.

While the business was ostensibly in the exclusive charge of The Oriental, its directors do not appear to have met but four times during its entire existence. Hermann A. Hauessler was secretary and treasurer of the Investment Company, and when the accident occurred, Alden reported the same to him and asked for instructions. The Investment Company paid Hauessler for his services in organizing The Oriental. After the lease had been made to The Oriental, accounts were run without change of style with prominent Dallas merchants who do not appear to have been advised of any change. After the alleged lease on November 29, 1894, the Investment Company contributed $2500 to purchase a new boiler for the hotel. There is also evidence tending to show that the Investment Company furnished some supplies. While The Oriental ostensibly had complete possession and management, and was entitled to all the revenues, yet the Anheuser-Busch Brewing Association paid the Investment Company $2000 to have its beer sold at the hotel, and The Oriental got none of this money. The Investment Company insisted that Stevens should countersign all checks drawn by Alden as manager of The Oriental, because the Investment Company lacked confidence in The Oriental's manager. It is undisputed that The Oriental, the Oriental Investment Company and the Oriental Hotel Association had the same stockholders, and that their holdings were exactly in the same proportions in all three companies, except that Alden, Reichenstein, and Stevens each held one share in The Oriental, which was deducted from the holdings of Busch.

It is conceded by appellant that the evidence is sufficient to support the verdict finding that the appellees sustained injuries through the negligent construction and operation of the freight elevator as claimed by them, and that they each sustained damages in the amount of their respective recoveries.

If the relation between the Investment Company and the operating company, The Oriental, was a mere cloak to cover up fraud, then there can be no doubt but the court is authorized to ignore the apparent rela-

tion between the parties in order to circumvent the fraud. Cook on Corp., secs. 6, 663. And in the absence of fraud, it has been held that where a railroad company causes a telegraph company to be incorporated, and subscribes to all of its stock and appoints all its officers and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the faith of the scheme being carried out, may hold the railroad company liable on the contract, on the principle of the principal being liable on the contracts of its agent. Telegraph Co. v. Telegraph Co., 51 Fed. Rep., 49; Telegraph Co. v. Telegraph Co., 54 Fed. Rep., 50.

Again, it is held that where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages without regard to its corporate character, the property of the branch corporation is subject to the debt of the parent company. Day v. Telegraph Co., 66 Md., 354, 7 Atl. Rep., 611. If a company leases all of its property to another, the stockholders in both being the same, a mechanic's lien good against the latter company is also good as against the company owning the property. Hatcher v. United L. Co., 75 Fed. Rep., 368.

So, where a construction company under contract with a railroad company takes all the stock and bonds and does all the work until the road is finished, a creditor of such construction company may file a lien under the statute and enforce it the same as though he furnished the labor and material to the railroad company itself. McDonald v. Railway, 93 Tenn., 281, 24 S. W. Rep., 252.

The case of Lehigh Mining and Manufacturing Company v. Kelly, 160 United States, 337, was a case in which a Virginia corporation owned certain lands in the State of Virginia for which it wished to bring suit in the United States court, and for that purpose its stockholders organized a new corporation under the laws of Pennsylvania called the Lehigh Mining and Manufacturing Company, to which the Virginia company conveyed its property, and suit was brought in the name of that company. A question arose whether the organization of the latter company for the purpose of bringing suit in the Federal court should be maintained. The Supreme Court of the United States, in passing upon the question, said that "the officers and members of the Virginia corporation had assumed as a body the mask of a Pennsylvania corporation for the purpose, and the purpose only, of invoking the jurisdiction of the Circuit Court of the United States, retaining the power, in their discretion, and after all danger of defeating the jurisdiction of the Federal court shall have passed, to throw off that mask and reappear under the original form of a Virginia corporation; their right, in the meantime to participate in the management of the general affairs of the latter corporation not having been impaired by the conveyance to the Pennsylvania corporation." It was held that the proceedings were ineffectual to confer jurisdiction on the Federal court

In this case the facts show that the Investment Company, as evidenced by the minutes of that company, as a company, determined to organize an operating company in which each of its stockholders was to take stock to the extent of 5 per cent of his holdings in the Investment Company; that such corporation was formed with practically the same stockholders, and that their holdings therein were in exact proportion to their holdings in the Investment Company; that the directors and officers of such company were elected by the Investment Company; that the only cash paid on the capital stock of the operating company was $2000 paid by the Investment Company; that Alden who had acted as manager of the hotel for the Investment Company was made the manager of the operating company; that the formation of the new company and the execution of this lease was not generally known; that the Investment Company did make certain repairs on the hotel during the term for which it was leased; that money contributed for the sale of a certain manufacture of beer in consideration of its use in the hotel bar went to the Investment Company and not the operating company; that the secretary and attorney of the Investment Company procured the charter for and organized the operating company, for which he was paid a fee by the Investment Company; that reports seem to have been regularly made by the manager to the Investment Company; and that the report of the accident which caused injury to plaintiffs was promptly sent to the secretary of the Investment Company and his advice requested; that the authorized capital of the operating company was only $10,000, and the entire property of the Investment Company, amounting to over $250,000, was turned over to said company, for which it agreed to pay a monthly rental of $1500 for two years and eight months, without security being demanded or given; and that before the expiration of the lease of The Oriental, the stockholders of the Investment Company formed a new corporation, known as the Oriental Hotel Association, to which company it caused all the property of the Investment Company and The Oriental to be conveyed. These facts tend strongly to show that The Oriental was merely the tool of the Investment Company, and in operating the hotel it was acting as the agent of that company. Railway v. Sellers, 17 Atl. Rep., 987; Railway v. Horan, 41 Am. and Eng. R. R. Cas., 13; Montgomery v. Forbes, 148 Mass., 252; Berkson v. Railway, 45 S. W. Rep., 1119. See also authorities cited in the discussion of first assignment.

The evidence was sufficient to raise this issue, and the court was justified in submitting the same to the jury. There was no error in refusing the charge instructing a verdict for defendant.

3. Appellant's fifth assignment of error complains that the trial court erred in this: "When the counsel for appellant offered in evidence the contract, dated October 10, 1893, between The Oriental and its manager, W. J. Alden, in allowing George Carden, attorney for plaintiffs, over the objection of this defendant, to state in the hearing of the jury, 'We object, because it is a self-serving document prepared by the Oriental

Investment Company for use in this case; that it is a self-serving contract, and the Oriental Investment Company and The Oriental were connected in the relation of principal and agent, and our position is that this document was made, and is a self-serving document between the two concerns for the purpose of denying that agency.' " Appellant contends that the plaintiffs did not thereafter offer testimony tending to impeach the date, signature thereto, or bona fides of said contract, and that such language prejudiced defendant's case with the jury, and that the language was calculated to mislead the jury. The objection made to the instrument was overruled by the trial court, and it was read in evidence. Appellants did not request any charge to have the jury disregard the remarks. There is nothing in the record showing that the jury were in any way influenced by the remarks. We are of opinion that the above assignment does not present any reversible error, and the same is overruled. The counsel had the right to state the ground of his objection, and we can not say that there was any abuse of that right in the remarks complained of.

4. Appellant's sixth assignment of error complains that the court erred in the first question propounded by it to the jury, because The Oriental had a legal corporate existence separate and distinct from the Oriental Investment Company, and plaintiffs, having nò voluntarily accepted employment under The Oriental, were estopped from questioning either its legal existenc or its ostensible relation to the Oriental Investment Company as the lessee of the latter company. The evidence shows that two of the plaintiffs, to wit, Sline and Barclay, were employed by the manager of the Investment Company prior to the execution of the lease to The Oriental, and that they had no notice of any change in the management of the hotel or of their employment. Alma Semond was employed by the housekeeper, Mrs. Hazen, after the execution of the lease. The defendant did not plead estoppel, except by exception to the petition. If it be true that the lease between the Investment Company and The Oriental was simulated, and a mere sham intended to conceal the true facts, and if in fact the Investment Company was operating the hotel, then we think that the company would be liable to an employe, although the contract of employment was made after its ostensible relation was created. This was a question for the jury to determine. We conclude that this assignment is without merit. These remarks also dispose of the seventh assignment adversely to appellant.

5. The eighth assignment of error asserts that the first question submitted to the jury and the answer thereto is not a sufficient basis for the judgment. The judgment does not purport to be based solely on that question and answer. It is based upon the verdict of the jury in answer to all the issues submitted to them in the form of questions. We think they constitute a sufficient basis for the judgment.

6. The eleventh assignment complains that the court erred in rendering judgment against defendant based upon the answer of the jury to the second question propounded to them in the general charge, because

so much of said answer as stated The Oriental was not running in its own behalf, but was acting for the Oriental Investment Company, was not in response to the question, and was but a conclusion of law, and same was not sufficient to support a judgment predicated upon the theory that The Oriental was not a lessee, but was an agent, of defendant. As already stated, the judgment is not based on any single finding, but upon the entire findings of the jury. It is clear that the jury understood the interrogatory propounded to submit the question of agency, and we think that such is the effect of the question, and that the answer is responsive and proper.

7. The sixteenth assignment complains of the action of the court in refusing the following charge requested by appellant: "The court declares the law to be, and instructs the jury, that there is no evidence before them which will authorize them to find against defendant in these cases on the ground that defendant was the owner of The Oriental, the Dallas corporation, or of its capital stock, or any part of it." The charge was properly refused. The pleadings of plaintiffs did not assert liability on the part of the Investment Company because it owned the hotel, but charged that it was operating it at the time of the accident, and for this reason, among others, it was liable.

8. The special charge requested by appellant, the refusal of which is made the ground of the nineteenth assignment of error, was on the weight of the evidence, and was therefore properly refused.

9. The special charge requested by appellant, the refusal of which is made the ground of the twentieth, twenty-first, and twenty-fifth assignments of error, were properly refused. No attack was made on the validity of the corporation, The Oriental. The charges were not called for by the facts.

10. The twenty-eighth assignment complains of the action of the court in calling the attention of the jury to the conflict in certain of their answers, and in sending them back to their room. The answers in which there was a conflict related solely to the issue as to whether the Investment Company exercised ordinary care and diligence in providing and maintaining a safe elevator. This issue was submitted to the jury in a different form in six interrogatories propounded to them. Their answers to four of these interrogatories were in favor of plaintiffs, and two were answered in favor of defendant. We are of opinion that the verdict as first tendered to the court is not responsive to the issue, in that it fails to find thereon. In such a case it is provided by statute that, "If the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto, and send them back for furher deliberation." Rev. Stats., art. 1327. By the terms of this statute, when the jury tendered to the trial court their findings upon this issue, it was his duty to call their attention to the issue to which there had not been a full response, and let them return for further deliberation. The trial court did not err in this respect.

11. The assignments not discussed are without merit and are overruled.

Finding no error in the record, the judgment is affirmed.

Affirmed.

Writ of error refused.

J. J. SEGAL v. J. A. ARMISTEAD.

Decided March 30, 1901.

Judgment—Reformation in Vacation.

Article 1357 of the Revised Statutes, authorizing reformation of a judgment in vacation, applies only to cases of mistake, miscalculation, or misrecital, such as are there enumerated, amendable by the record, but does not authorize reformation on the ground that a previous amendment increasing the judgment against defendant has been made during the term, after his motion for new trial had been overruled, and without notice to him.

Error from Marion. Tried below before Hon. J. M. Talbot.

Geo. T. Todd and *T. D. Dowell,* for plaintiff in error.

RAINEY, CHIEF JUSTICE.—This is an action of trespass to try title and for rents, brought by defendant in error against J. J. Segal, plaintiff in error, and one William Minter. Defendant in error recovered judgment for the land and for rents. A motion for new trial was made and overruled and notice of appeal was given, but no appeal was perfected. Judgment was rendered June 22, 1900, and court adjourned on June 26th, following. On June 30th, following, and in vacation, defendant [plaintiff?] in error filed a motion to reform the judgment, alleging in substance that after the motion for new trial was overruled, before the adjournment of the term and without notice to plaintiff in error, the court changed its judgment as originally made, and entered judgment against plaintiff in error for a larger amount than originally given. The court in vacation heard the motion to reform on August 30, 1900, and overruled same, and J. J. Segal sued out a writ of error and prosecutes same to this court.

There appears in the record a statement of facts signed by the judge, which was filed August 6, 1900. At a former day of this term motion was made to strike out said statement of facts because not filed in time, and action was postponed on same until the cause was regularly submitted.

The motion to reform the judgment was not one that could be entertained by the court in vacation. The statute only authorizes the amendment of a judgment in vacation where there is a mistake or misrecital of any sum or sums of money, or of any name or names, and where there shall be among the records of the cause any verdict or instrument

of writing whereby said judgment may be safely amended. This case does not come within the terms of the statute. The judge in vacation has no right to amend a judgment, except as authorized by the statute. Ford v. Liner, 59 S. W. Rep., 943; Hardware Co. v. Stove Co., 88 Texas, 468.

The statement of facts not having been filed in time, the motion to strike out will be sustained and said statement not considered by this court. There being no statement of facts that we can consider, and the record otherwise failing to show error, the judgment is affirmed.

Affirmed.

Writ of error refused.

EQUITABLE LIFE ASSURANCE SOCIETY v. MARTHA P. EVANS.

Decided March 16, 1901.

Life Insurance—Forfeiture—Paid-Up Insurance—Surrender of Policy.

Where a life insurance policy stipulated that in case it should, after three years, become void by reason of nonpayment of any premium due thereon, the insurance company would issue in lieu thereof a paid-up policy for the amount of the premiums already paid, provided the policy, duly receipted, should be surrendered to the company within six months after such default in payment, a compliance with such condition precedent within the six months is essential to a recovery of such paid-up insurance, time being of the essence of the contract in this regard.

Appeal from Hopkins. Tried below before Hon. B. W. Foster, Special Judge.

Coke & Coke, for appellant.

Crosby & Dinsmore, for appellee.

SMITH, SPECIAL ASSOCIATE JUSTICE.—This is a suit by Martha P. Evans, appellee, who is the surviving wife of Harry A. Evans, deceased, against the Equitable Life Assurance Society, of the United States, claiming an indebtedness by virtue of a policy of insurance on the life of Harry A. Evans, issued by the appellant. In the court below judgment was rendered in favor of the appellee for the sum of $1250 with interest thereon from December 6, 1898, from which appellant has duly appealed.

The policy of insurance was dated and issued on February 9, 1888, in favor of appellee, and contained the following provisions considered necessary to be set out, to wit: "The Equitable Life Assurance Society of the United States, No. 120 Broadway, New York, in consideration of the application for this policy of insurance, and of each of the statements made therein; and in further consideration of the payment of the

sum of $139.65, at the office of the society, in the city of New York, at the date thereof, and of the annual payment of $139.65, to be paid at the said office, on or before the 24th day of January in every year (provided that when premiums for twenty full years shall have been duly paid to said society, no further premiums will be required), does promise to pay to Martha P. Evans, wife of Harry A. Evans, for her sole use, if living, in conformity with the statute, * * * the sum of five thousand dollars (any indebtedness to the society on account of this contract to be first deducted therefrom), at the office of the society, in the city of New York, within sixty days after satisfactory proofs of the death of said Harry A. Evans, of Lancaster, in the county of Garrard, State of Kentucky, shall have been furnished to the society at its said office. * * * And further, that if premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society, and this policy should hereafter become void in consequence of default in payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid up policy, without participation in profits, in favor of said Martha P. Evans, if living, and if not living, to the surviving children of said Harry A. Evans, or their guardian, for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of said Harry A. Evans, for as many twentieth parts of the original amount hereby assured as there shall have been complete annual premiums received in cash by said society upon this policy at the date when such default shall first be made; provided, however, that this policy shall be surrendered, duly receipted, within six months of the date of default in payment of a premium as mentioned above. * * * All premiums are considered payable annually in advance * * * and if any premium, or installment of a premium, on this policy shall not be paid when due, this policy shall be void; and no credit for surplus accumulated on this policy shall be deemed applicable to the payment of any premium; nevertheless, nothing herein shall be construed to deprive the holder of this policy of the privilege to demand and receive paid up insurance in accordance with the agreement contained in this policy."

An indorsement on said policy, dated New York, January 23, 1893, and duly executed by appellant is as follows: "In lieu of the annual premiums due hereafter on this policy there shall be substituted semi-annual premiums each of $72.65, payable on each twenty-fourth day of January and July hereafter, during the continuance of the policy."

On the trial it was agreed and we find that on and prior to January 24, 1888 appellee was the lawful wife of said Harry A. Evans; that she continued to be such wife until the death of said Harry A. Evans, which occurred in the town of Sulphur Springs, Texas, on the 5th day of August, 1898; that said Harry A. Evans paid the premiums upon said policy of insurance down to July 24, 1893; that on the last named date said policy of insurance lapsed for nonpayment of premium due on said date; that proofs of death under and in accordance with the policy were

furnished by appellee to appellant on October 6, 1898, which proofs were on the same day returned by appellant to appellee with a letter stating that said policy had lapsed for nonpayment of premium on July 24, 1893, and by its terms was null and void. We further find the uncontroverted facts to be that Harry A. Evans defaulted in the payment of the semi-annual premium which became due on July 24, 1893, and that same has never been paid; that no demand upon or application to appellant was made by Harry A. Evans, nor by anyone else for a paid-up policy based upon the aforesaid policy within six months from July 24, 1893, and said policy was not by Harry A. Evans, nor by anyone, surrendered duly receipted, nor surrendered at all, within six months of July 24, 1893. The record shows that there was some correspondence between Harry A. Evans and appellant in April and May, 1894, but in view of the disposition we feel constrained under the law to make of this case, we deem it unnecessary to here set it out.

It is contended by the appellee that the surrender of the original policy, duly receipted, to appellant within six months of July 24, 1893, the date that Harry A. Evans made default in the payment of the semi-annual premium, was not, under the contract, a condition precedent to the right of Harry A. Evans to paid up insurance, but that, having paid five complete annual premiums, he became, ipso facto, upon making default in the payment of the premium, absolutely entitled to a paid-up policy of insurance on his life, in an amount equal to five-twentieths of the face of the original policy, that is, to paid-up insurance for $1250; and appellee's suit is brought to enforce this claim; and appellee contends further that, if a surrender of the original policy duly receipted was an act that was required to be performed by Harry A. Evans, or some one else, before his right to such paid-up insurance became absolute, the then time within which the original policy was required to be so surrendered was not of the essence of the contract, and that it was not necessary that it should be done within six months after defaulting in the payment of the premium.

Appellant's contention is just the reverse, and is presented by its first assignment of error, which is as follows: "The court erred in rendering judgment in favor of the plaintiff, because the evidence shows that her right to recover any sum was dependent upon the surrender to defendant of the policy introduced in evidence, duly receipted, within six months from July 24, 1893, and that no surrender of said policy within said time, duly receipted, or otherwise, was made or attempted to be made by plaintiff, or anyone else."

The right of Harry A. Evans to paid-up insurance in the amount of five-twentieths of $5000, after having paid premiums for five complete years, upon making default in the payment of premium on July 24, 1893, was not a perfected, absolute right. It was an inchoate right made by the very contract which Harry A. Evans entered into and upon which appellee relies, to depend upon the performance by Harry A. Evans, or the beneficiary, of an act whose performance rested with him alone.

He was required by the contract to surrender the original policy, duly receipted, within six months of his default in payment of the premium before his right to paid-up insurance should become absolute. The record does not show any legal excuse for his failure to do this, nor that the appellant has in any manner waived such failure. There is nothing in this requirement of the policy that is in violation of any statute or principle of public policy, and the provision itself appears to be reasonable. Courts have no power under such circumstances to enlarge the rights of a party under contract which he has voluntarily assumed, or to say that a part performance is as good as a complete performance. Under the contract Harry A. Evans had current insurance on his life in the sum of $5000 until he made default in the payment of the semi-annual premium which became due on July 24, 1893. Instantly upon making such default, his current insurance for $5000 lapsed, and his sole right then was to surrender his original policy, duly receipted, to appellant within six months of such default, whereupon he would have been entitled to a new paid-up policy of insurance on his life in the sum of $1250. It would not be contended that the current insurance in the sum of $5000 upon his life was in force after such default. It is universally held that under such a policy the payment of the premium when due is a condition precedent to the continuation of the liability of the insurer so far as the original amount of insurance is concerned. In such case time is of the essence of the contract. Now, when the original insurance has lapsed by default in the payment of the premium, and the contract provides that the insured shall be entitled to a new paid-up policy for a certain amount, provided he perform a certain act, to wit, surrender the original policy, duly receipted, within a specified time, why is time not of the essence of the contract as well as in the payment of the premium? In one case money is to be paid, in the other an act to be performed by the insured. It must be presumed that the performance of the required act on the part of the insured within the time required was deemed material by the parties to the contract, and, in this kind of contract, of value to the insurer, else it would not have been inserted in the contract. We conclude that the surrender of the original policy, duly receipted, within the time prescribed was a condition precedent to the right of Harry A. Evans to paid-up insurance, and that by his failure to do this his imperfect right thereto never matured and is now lost. In this conclusion we are sustained by the great weight of authority. Stayner v. Insurance Co., 49 N. Y. Supp., 380; McLaughlin v. Insurance Co., 57 N. W. Rep., 557; Hudson v. Insurance Co., 28 N. J. Eq., 167; Attorney General v. Insurance Co., 93 N. Y., 70; Cravens v. Insurance Co., 50 S. W. Rep., 526; Knapp v. Insurance Co., 117 U. S., 411; 2 Joyce on Ins., sec. 1185, and authorities there cited; Insurance Co. v. Devore, 14 S. E. Rep., 532; Insurance Co., v. Whitehead, 58 Miss., 230, 38 Am. Rep., 322; Sheerer v. Insurance Co., 20 Fed. Rep., 886.

We have found no authority clearly to the contrary, except from the State of Kentucky, and the decisions of that State have not been har-

monious. See Hexter v. Insurance Co., 15 S. W. Rep., 863; Insurance Co. v. Jarboe, 42 S. W. Rep., 1097; Montgomery v. Insurance Co., 14 Bush, 51; Insurance Co. v Montague, 2 S. W. Rep., 443; Chase v. Insurance Co., 67 Me., 85; Dorr v. Insurance Co. (Maine), 7 Ins. Law Jour., 370.

There are other assignments of error presented by appellant which are not necessary to be considered in view of our conclusions upon the vital question in this case. We therefore conclude that the court erred in rendering judgment for appellee and that the judgment of the court below should be reversed and judgment here rendered for appellant, and it is so ordered.

Reversed and rendered.

Writ of error refused.

Missouri, Kansas & Texas Railway Company v. W. L. Ray.

Decided April 27, 1901.

1.—Railroads—Injury at Crossing—Degree of Care.

Where a traveler is signaled by a railroad flagman to cross the track, he has the right to presume that it is safe to cross, and is not bound to exercise the same degree of care as where no such signal had been given, but is required to use only such care as would a reasonably prudent man under the circumstances.

2.—Same—Fact Case—Frightening Horse.

Where a traveler approaching a railroad track is signaled by the flagman there to cross, and upon doing so is nearly struck by the sudden starting up with considerable noise of an engine near there causing his horse to take fright and run away, and himself to be thrown from the buggy and injured, he is entitled to recover from the railway company therefor.

Appeal from Hunt. Trial before Hon. L. A. Clark.

T. S. Miller and *Head, Dillard & Muse,* for appellant.

J. G. Matthews and *Sherrill & Hefner,* for appellee.

BOOKHOUT, Associate Justice.—This is a suit instituted by W. L. Ray, appellee, against the appellant to recover damages for personal injuries. The pleading alleged that on January 28, 1899, the plaintiff and another were driving in a buggy along Lee street in the city of Greenville, plaintiff doing the driving. When they reached the crossing of defendant's railroad over Lee street, they stopped to ascertain if it was safe to cross; that the flagman stationed by defendant at said crossing signaled them to cross; whereupon they drove upon the track, and an engine which was near the crossing and a little north of it started south over the crossing, and the moving engine nearly caught the buggy, and this, together with the noise occasioned by the escaping steam, caused

the horse to run away and injure plaintiff. A trial resulted in a verdict for $1250, upon which judgment was duly entered, and defendant has perfected its appeal to this court.

The first assignment of error complains that the court erred in giving the following special charge requested by plaintiff: "When a traveler is notified by a railroad flagman to go upon a crossing, he has a right to presume that it is safe to cross, and is not bound to exercise the same degree of care which he is expected to exercise if no signal had been given by the flagman, but is only required to exercise for his own safety such care as a reasonably prudent man would exercise under similar circumstances."

This charge is objected to as being on the weight of the evidence in telling the jury that a traveler is not bound to exercise the same degree of care which he would be bound to exercise if no signal had been given by the flagman. (2) It is on the weight of the evidence in telling the jury that the plaintiff had a right to presume that it was safe for him to cross, the view of the surroundings being more or less open to him, and that it could not be charged that he could presume that it was safe for him to cross if those surroundings indicated the want of such safety. There are other objections made, but they are substantially embraced in those above set out.

When the plaintiff was signaled by the flagman to cross the track, this was an assurance that it was safe to do so, and the plaintiff had the right to rely thereon. The same degree of care was not required of him as if there had been no such invitation. Such invitation would not excuse a traveler, however, from rushing recklessly into certain and apparent danger. He should use such care as a reasonably prudent man would under the circumstances. Elliott on Railroads, sec. 1157; Sweeney v. Railway, 10 Allen, 368; Sharp v. Glushing, 96 N. Y., 676; Pennsylvania Co. v. Stegemeier, 118 Ind., 305.

The charge complained of embraced the principles above announced. It concluded by telling the jury that the plaintiff was required to exercise such care as a reasonably prudent man would exercise under similar circumstances. The charge, we think, is correct and the first assignment is overruled.

The only other assignment presented in the brief of appellant challenges the verdict as being contrary to the evidence. The evidence is conflicting upon all material issues. There is evidence sufficient to support the verdict finding the following facts, and in deference to the verdict we so find: The plaintiff, being about to drive in his buggy across the track of defendant railroad at Lee street, a public crossing in the city of Greenville, upon approaching said crossing stopped to ascertain if it was safe to cross. He waited until he saw the flagman, stationed by defendant at said crossing to give notice of the movements of defendant's engine and cars, signaled to him to cross. He then started across, and when about half way over, the defendant's engine, which was standing just north of the crossing, and from which the steam was escaping with

considerable noise, began to move south in the direction of the plaintiff's buggy, coming almost in contact with it, causing his horse to take fright and run away, throwing plaintiff from his buggy and injuring him, whereby he sustained damage in the amount found by the jury.

The defendant was negligent in giving the signal to plaintiff to cross under the circumstances, and in running its engine so close to plaintiff's buggy and in permitting the steam to escape in the manner it did. The plaintiff was not negligent in attempting to cross in obedience to the signal given by defendant's flagman. The verdict and judgment are supported by the evidence.

Finding no error in the record the judgment is affirmed.

Affirmed.

Writ of error refused.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. PAT STONECYPHER.

Decided May 4, 1901.

1.—Railroads—Accident at Crossing—Brakeman—Pleading.

Where plaintiff had driven up near a railroad crossing, and a brakeman on a train which had just cleared the crossing and stopped, signaled plaintiff to cross over, plaintiff was warranted in relying on such invitation and attempting then to cross. See opinion for allegations held sufficiently full to show liability on the part of the railway company in such case.

2.—Damages for Personal Injuries—Doctors' Bills—Pleadings.

In an action of damages for personal injuries, including doctors' bills incurred for medical treatment, it is not necessary that plaintiff's petition allege the time and place at which such medical services were rendered, as in an action on account brought for the value of such services.

3.—Same—Loss of Time—Double Recovery.

Where plaintiff alleged his lost time to be worth $150 per month, aggregating $385, for which he asked judgment, and also that the injuries had diminished his capacity to labor and earn money, and that his loss of time and personal injuries had damaged him in the sum of $10,000, for which he prayed recovery, the petition was not subject to exception on the ground that he claimed damages twice for the loss of time.

4.—Same—Evidence of General Reputation Warranted.

Where defendant offered proof that plaintiff, who was a witness in the case, had been indicted for perjury, this was a direct attack upon his truth and veracity such as warranted evidence in rebuttal to show that his reputation was good in that respect.

5.—Charge—Clause Not Ignoring Other Sections.

Where a clause of the court's charge instructed the jury that if they should find that the action of defendant's servants in charge of a train causing it to back on the crossing was negligent under the circumstances, and that but for such negligence plaintiff would not have been injured, then they should find for plaintiff, unless they should find for defendant "under the instruction hereinafter given," this was not misleading as tending to induce the jury to understand that they could return a verdict for plaintiff independent of what followed in the other paragraphs.

6.—Same—Acts Causing Injury Need Not Be Willful.

The court properly refused a charge to the effect that plaintiff could not

recover by reason of his team becoming frightened, unless the act of defendant's servants which caused the team to become frightened were wantonly and willfully done.

7.—Same—Contributory Negligence—Mistaking Signals.

It was a question for the jury whether or not the defendant's brakeman signaled plaintiff to cross the track; and if he intended to signal for the engineer only, it was still a question of fact as to whether the operators of the train acted with ordinary care, and whether plaintiff was guilty of contributory negligence under the circumstances. See opinion for charge held sufficient on this phase of the case.

Appeal from Hunt. Tried below before Hon. L. A. Clark.

E. B. Perkins and *Perkins, Gilbert & Perkins,* for appellant.

Evans & Elder, for appellee.

RAINEY, CHIEF JUSTICE.—Appellee sued to recover damages for personal injuries alleged to have been caused by the negligence of appellant on June 27, 1900, at the crossing of a public street over appellant's track in the city of Greenville, by the backing of train and freight cars, and in frightening his team after a signal had been given to appellee by an employe of appellant to drive over said crossing. The trial resulted in a verdict and judgment for appellee from which this appeal is prosecuted.

The first and tenth assignments of error are grouped, and are as follows:

"1. The court erred in overruling defendant's general exception to plaintiff's petition, for the following reasons: Because no cause of action is shown therein for the following reasons: (a) In that it does not allege that the persons said to have invited plaintiff to drive across the track were in the discharge of their ordinary duties in extending said invitation; (b) because it is not alleged that the persons so extending said invitation were acting within the apparent scope of their authority; (c) because it is not alleged therein that defendant was in any way responsible or bound for the acts of the persons extending such invitation; (d) because it is not alleged therein that plaintiff in driving across at the time he did, relied upon such invitation; (e) because it is not alleged therein that plaintiff believed it was safe to drive across the track at the time he did; (f) because it was not alleged therein that plaintiff was misled by such invitation; (g) because the petition does not show that defendant was liable for the alleged damages.

"10. The court erred in the same paragraph of his charge referred to in the ninth assignment beginning with the use of the following language: 'If you further find from the evidence that after said train had cleared said crossing, one of defendant's brakeman on said train invited the plaintiff to drive his team and wagon across said crossing, and that the plaintiff, after being so invited, started to drive across said crossing,' because (a) the same is not made to depend upon the question of whether

the brakeman, in extending the invitation, was acting either within the scope of his authority or within the apparent scope of his authority; (b) or that the act of the brakeman in extending such invitation was the act of the defendant."

Plaintiff's petition alleges that Houston street was a main thoroughfare in the city of Greenville, dedicated to public use, etc.; that many people passed along it daily; that it crossed appellant's track in the city of Greenville, and that it is daily used in reaching the residence and business portions of the city by the public, which were well known to appellant; that plaintiff was driving a gentle team, and that when within about thirty feet of appellant's track a freight train, operated by its agents and servants, passed the crossing going west; that appellant stopped his team near the track; that when said train had passed the crossing and cleared the street that the same was stopped, and that the agents and servants in charge of said train invited the plaintiff to drive his team across the said crossing; that plaintiff started his team for the purpose of crossing the track, and that when in the act of stepping thereon, those operating the train, with knowledge of plaintiff's situation and intention to cross, or by the exercise of ordinary care could have known these facts, negligently and carelessly, without giving any notice of the train's approach, and without giving any signal required by law, suddenly backed said train into said street and onto plaintiff's mules, at a rapid and dangerous rate of speed, and making a loud noise, frightening plaintiff's team, and causing same to back and turn suddenly to the right, etc., which caused his injuries.

The allegations of plaintiff's petition were sufficiently full to show liability on the part of appellant and authorize a recovery by plaintiff, if true. The court did not err in overruling the general demurrer, nor do we find any error in the paragraph of the court's charge here complained of.

The evidence shows that the plaintiff was traveling along the street toward the crossing, and that when he came near the railroad there was a train pulling up to the crossing, and he stopped the team that he was driving to the wagon. The wagon and team were owned by one Isam, with whom plaintiff was traveling. It was a four-mule team, and when they stopped, Isam took off his two front mules, because he was afraid of the train, and tied them to the rear of the wagon. When the train cleared the crossing plaintiff drove the wagon up fifteen or twenty yards, when one of the employes operating the train beckoned him to come ahead. He started to drive over said crossing, and about the time his team reached the main track, and before they stepped thereon, the agents and servants of defendant in charge of said train took knowledge of plaintiff's situation and suddenly backed said train into said street in front of plaintiff's team, and the movement of said train and the noise thereof caused plaintiff's team to become frightened, etc.

While the evidence conflicted as to whether or not one of the employes

operating said train beckoned plaintiff to drive across, it is sufficient to support the jury's finding that plaintiff was invited to cross by one of defendant's employes, and the evidence authorized the court to give the instructions complained of. The employe who gave the invitation to cross being engaged in assisting in the operation of the train, warranted the plaintiff in relying upon said invitation and to act thereon in attempting to drive across.

The second assignment of error complains of the action of the trial court in overruling defendant's special exception to that part of plaintiff's petition which is as follows: "He was compelled to and had incurred an expense of $100 for doctor's bill and medical treatment for his said injuries as follows: Dr. C. M. Cook, $40; Dr. P. A. Peak, $60; total, $100; that amount charged by each of the physicians is a reasonable charge for said services." The exception to said allegation was that it did not give the date and place at which said alleged services were rendered. We see no error in the overruling of said exception. The plaintiff was suing for the amount that defendant had caused him to pay for doctor's bills and medical treatment, and it was not incumbent upon him to more specifically set out his claim. He was not suing on an account where he had performed services at different times and places, but was suing for an amount that he was compelled to pay by reason of defendant's negligence. The case would have been different had the doctor been suing to recover the amount of his bill. In such case it would have been necessary for him to have itemized his account. The court in its charge to the jury did not authorize the jury to consider doctor's bills; and if there is merit in plaintiff's exception, the effect of the court's charge was to render his action in overruling the exception harmless.

The third assignment of error is as follows: "The court erred in overruling defendant's second special exception to plaintiff's petition, which exception is as follows: 'Because the second and third items of damage set forth in said petition are for the same items of damage stated only in a different way, and the third item includes the second, thereby pleading the same twice,' because the second item of damage set up in plaintiff's petition was based on the allegation that he had been unable to perform [work] since injured, and that the time lost was reasonably worth $150 per month, aggregating $385, and the third item claimed that the injuries had affected plaintiff's physical and mental system, so as to diminish his capacity to labor and earn money, and alleged that the loss of time and permanent injuries suffered by plaintiff had damaged him in the sum of $10,000, and then he prayed for judgment for the $10,000, adding thereto the $385 contained in the second item, and the $100 set forth in the first item, aggregating $10,485, because the effect of said pleading was to claim $385 for loss of time up to the time of the trial, and also including in the item of $10,000 damages the loss of time, thereby claiming the $385 as a separate item, and

then claiming damages for the same facts in the item of $10,000." Defendant's exception in this particular, in our opinion, was not well taken and the court did not err in overruling it.

Appellant groups his sixth and eighth assignments of error, and they are considered together: "6. Because the court erred in allowing plaintiff's witness, Dr. Cook, to answer over defendant's objection, as shown by bill of exceptions number 5, the following question: 'Do you know Stonecypher's reputation for truth and veracity?' to which witness was permitted to answer, 'Yes, sir.' And the witness was then asked, namely: 'I will ask you, then, whether that reputation is good or bad,' to which last question he was permitted to answer, 'His name is good any where, so far as I know.' Because said questions and answers thereto were immaterial and irrelevant, in that Stonecypher's reputation for truth and veracity was not put in issue by the pleading or the evidence." "8. The court erred in permitting the witness Tom Robinson to answer, over the objections of the defendant, the following questions as shown by bill of exceptions number 7, namely: 'Do you know the general reputation of the plaintiff in the community in which he lives for truth and veracity?' and was permitted to answer thereto that he did, and that it was good, because said question and answer were immaterial and irrelevant in this, that the general reputation for truth and veracity of the plaintiff were not put in issue by the pleadings and the evidence."

On the trial of the case defendant proved that the plaintiff had been indicted for perjury, and this, in our opinion, was a direct attack upon his truth and veracity and authorized the evidence complained of. It will be noted from the bill of exceptions in regard to the witness Dr. Cook, and the explanation of the court in approving the same, that objections were made only to the question propounded to the witness as to plaintiff's reputation for truth and veracity, and that no mention was made to exclude his answer to such interrogatory. We conclude, therefore, that said assignments are not well taken.

The following paragraph of the court's charge is complained of, to wit: "And if you further find that the action of the defendant's servants in charge of said train in causing the same to back on said crossing (if they did so) was, under the circumstances, an act of negligence as that term is above defined, and that but for such negligence plaintiff would not have been injured, then you will find for plaintiff, unless you find for defendant under the instructions hereinafter given." The objection urged to this charge is, "that the same was calculated to mislead the jury and lead them to believe they might return a verdict for the plaintiff based on this paragraph of the charge, independent of what follows in the next paragraph."

We are of opinion that this contention is not well founded, because in said paragraph the court instructed the jury to look to following portions of the charge in reaching a verdict, and in the following portions the court properly charged the jury the defendant's theory of the case

which, if believed by the jury, would not have entitled plaintiff to a recovery. There is no merit in appellant's contention.

Appellant asked a charge to the effect that plaintiff could not recover by reason of his team becoming frightened at the train unless they believed from the evidence the acts of defendant's employes which caused the team to become frightened were wantonly and willfully done. This charge was properly refused. The defendant's servants were bound under the circumstances to use ordinary care to prevent the frightening of plaintiff's team, and if they failed to use such care, and plaintiff was not guilty of contributory negligence, he was entitled to recover for the injuries he sustained.

Appellant's twelfth assignment of error is as follows: "The court erred in refusing to give charge number 4, asked by defendant, which in effect directed the jury that defendant's servants were under no obligation to plaintiff to take precautions to avoid frightening his team, until they had discovered or been apprised of the fact that the team had become frightened, and that then they would only be required to avoid unnecessary noise which would be calculated to further frighten said team, because, under the issue presented by the pleading and the evidence, the question as to whether any unusual noises were made in operating the train after it was apparent that plaintiff's team had become frightened was immaterial." There was no error in the court's refusing the charge requested. It was the duty of appellant's employes to use ordinary care in operating the train to avoid injury to those who attempted to cross, and under the facts of this case the court properly instructed the jury as to the duty of appellant's employes. We think the special charge was not applicable to the facts.

The thirteenth assignment of error is as follows: "The court erred in refusing to give charge number 5, asked by defendant, which in effect told the jury that if they believed that plaintiff, with the knowledge that his team was likely to be frightened, carelessly and negligently attempted to act upon a signal given by an employe of the defendant to the engineer, and negligently and carelessly failed to inquire whether said signal was intended for him, etc., then they should find for the defendant, because the same was a correct application of the law and the facts to the issues made by the pleadings and evidence in this case. The undisputed evidence shows that after defendant's employes had run the train across the street where plaintiff and his team were standing, and that defendant's brakeman, who stopped on the crossing, gave a signal with his hand, which he intended to be a signal to the engineer to back the train, and which the engineer so understood and acted on, and which plaintiff mistook to be a signal for him to drive over the crossing, which phase of the case is nowhere made by the charge given to the jury."

Whether or not appellant's employe signaled plaintiff to cross the track was a question of fact for the jury to determine. On that issue the court charged the jury at the request of the defendant as follows: "But if you believe from the evidence that said employe of defendant could

not in fact notify plaintiff to cross the track, but that said employe made a signal to the engineer which the plaintiff mistook for an invitation to cross the track, and that by reason of said mistake plaintiff drove so near to defendant's track that his team was frightened by the backing of the train, and if you further believe that the employes of the defendant in charge of the said train did not know that the plaintiff had misunderstood the signal, and were therefore not apprised of the plaintiff's danger, the plaintiff can not recover, and you should find for the defendant."

This charge was as favorable to the defendant as it was entitled to have given. Even if the employe who gave the signal only intended it for the engineer, it was still a question of fact for the jury as to whether the operatives acted with ordinary care, and whether the plaintiff was guilty of contributory negligence under the circumstances. We are of the opinion that the requested charge was properly refused.

We conclude that all the material allegations of plaintiff's petition were established by the evidence, and that plaintiff is not guilty of contributory negligence. The judgment is therefore affirmed.

Affirmed.

C. H. BEACHAM, JR., v. J. D. WITHERS ET AL.

Decided May 11, 1901.

1.—Costs—Collection from Winning Party.

Where the costs of suit can not be collected from the party against which they are finally adjudged, an execution may, under the statute, issue against any party to the suit for the costs incurred by such party, but not until proper diligence has been used, as by issuance of execution, to collect from the party against which the costs of suit were adjudged. Rev. Stats., art. 2491.

2.—Same—Officer Estopped by Negligence.

Where a defendant was liable for certain costs, and at the termination of the suit the constable had in his possession by virtue of a distress warrant issued in the case certain property of the defendant which he could have subjected to the payment of such costs, and he delivered the property back to the defendant, he was thereby estopped from claiming such costs from the plaintiff.

Appeal from the County Court of Hopkins. Tried below before Hon. H. C. Connor.

V. M. Clark, for appellant.

King & Allen, for appellees.

RAINEY, CHIEF JUSTICE.—This is an injunction suit, brought by appellant to enjoin appellee sheriff of Hopkins County, from enforcing an execution issued on a judgment for costs wherein appellant was plaintiff and one Johnson defendant. The court below, on the hearing

of the case, dissolved the injunction, from which this appeal is prosecuted.

The facts show that the appellant brought suit against one Johnson for rent, and caused a distress warrant to issue and be levied on certain property, corn and cotton, of the said Johnson. An agreed judgment was rendered, dismissing the suit, and that each party pay all costs by them incurred, "except that judgment be rendered against the defendant for all costs therein incurred for gathering and caring for the crop distrained herein." At the time of the rendition of this judgment, D. E. Culpepper, a constable in and for Hopkins County, and in whose behalf the execution herein sought to be enjoined was issued, held possession of the corn and cotton by virtue of the distress warrant, which property was of value greater than the amount of cost claimed, that is, the amount adjudged against the defendant Johnson. After the rendition of the judgment, said constable voluntarily delivered the corn and cotton to the defendant Johnson. The constable never made any demand or attempt in any way, at any time, to collect the cost claimed from defendant Johnson. The execution sought to be enjoined was issued to Hopkins County and levied upon the land belonging to defendant, and said land was advertised to be sold thereunder.

The first question that arises is, whether or not, after final judgment rendered adjudging cost against a party, an officer is entitled to have execution for his cost against the opposite party at whose instance the cost was incurred before an attempt to collect it from the party against whom it was adjudged in the final judgment?

Article 2941, Revisted Statutes, provides: "Each party to a suit shall be liable for all costs incurred by him, and in case the costs can not be collected of the party against whom the same has been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more." This article contemplates that the party to whom costs are due shall first use proper diligence to collect it from the party against whom it is adjudged, before it can be demanded of the opposite party who incurred it. The insolvency of the party against whom cost is adjudged might excuse the failure to make an effort to collect from him. There being no effort made to collect from Johnson, and it not being shown that he was insolvent, the execution was wrongfully issued, and said injunction should have been perpetuated.

We are further of the opinion that the constable is not in an attitude to demand of appellant the costs sought to be collected. When the suit was dismissed, he had property of Johnson's in his possession, and by the use of proper diligence he could have subjected it to the payment of said cost, and failing to do so, he is estopped from now claiming it of the appellant. Under the facts as presented the court erred is not rendering judgment for appellant. The judgment is therefore reversed and here rendered for appellant.

Reversed and rendered.

RACHEL STEVENSON ET AL. v. W. S. ROBERTS ET AL.

Decided May 18, 1901.

1.—Independent Executor—Power to Mortgage.

An independent executor having power under the will to sell the property of the estate for the payment of debts, has the power to mortgage the property to secure such debts.

2.—Same—Abuse of Discretion—Purchaser Protected.

Such mortgage is not rendered void nor are the rights of good faith creditors and purchasers under it affected by the fact that the independent executor may have abused his discretion in determining whether it was necessary to give the mortgage, or in selecting the property to be mortgaged.

3.—Same—Improvements in Good Faith.

Where land was devised to an independent executrix with remainder to plaintiffs, and such executrix, joined by her husband, mortgaged the land to secure debts of the estate, and under foreclosure of the mortgage the land was bought for the joint benefit of the purchaser and the husband, and one-half of it subsequently conveyed by such purchaser to the husband who sold it to defendant, the fact that defendant knew that the husband was in some way connected with the foreclosure sale would not in law make his purchase and occupancy of the land in bad faith so as to preclude him from recovering the value of the improvements placed by him thereon.

Appeal from Limestone. Tried below before Hon. L. B. Cobb.

Kimball Bros. & Blackman and *W. D. Brown,* for appellants.

Farrar & Williams, for appellees.

TEMPLETON, ASSOCIATE JUSTICE.—H. H. Stevenson was twice married. He died in 1890, and his second wife and children by each marriage survived him. At the time of his death he owned 46 head of cattle valued at $472; five horses and mules valued at $235; 21 head of hogs valued at $27; a steam engine valued at $475; a lot of gin and mill machinery valued at $527; other personal property valued at $730; one town lot valued at $25; 40 acres of land valued at $120; 140 acres of land valued at $420, and 420 acres of land, on which he resided with his family, valued at $2000. These are the values placed on said property by the appraisers of his estate. There were notes and accounts due the estate, aggregating $184.47. He owed D. Thomason $115. He also owed G. D. Johnson two notes, one for $275.72, due October 15, 1890, and the other for $275.73, due November 15, 1890, each bearing 8 per cent interest per annum.

Stevenson left a will by which his wife was appointed independent executrix of his estate without bond, and it was provided that no action should be had in the probate court except to probate the will and return the proper inventory. The will was duly probated; the inventory returned and approved, and the executrix qualified.

By the will the 420 acres of land was devised to Mrs. Stevenson for

life, and after her death to the children of herself and the testator. Twenty head of choice cattle, all the hogs, two work horses or mules and two mares and colts, were devised absolutely to the wife. The executrix was directed to sell the horses and cattle not specifically devised, the steam engine, and the 140 acres of land, and apply the proceeds to the payment of the debts of the testator, the balance arising from such sales to be divided between the children of the first marriage. All the property not specifically devised was to be divided between the children of the second marriage.

Soon after the death of her husband, Mrs. Stevenson married a man by the name of Thames. On July 1, 1891, Mrs. Thames, as executrix, joined pro forma by her husband, executed to Johnson, to secure the notes owing to him by the estate, a deed of trust providing for a trustee with power of sale, covering the town lot, the 40-acre tract of land, the 140-acre tract and 240 acres of the 420-acre tract. By the terms of the deed of trust the time for the payment of the notes was extended to October 1, 1891, and October 1, 1892, respectively, and it was further provided that default in the payment of the first note should mature the second note. In consideration of the extension it was agreed that the rate of interest should be increased from 8 per cent to 10 per cent per annum. The first note not being paid at maturity, the lands were sold by the trustee, and bought in the name of J. W. Allston. The 40 acres sold for $55; the 140 acres for $160, and the 240 acres for $250. It is not shown what the town lot brought. Allston bought the 240 acres for himself and Thames, each paying one-half the purchase money, and Allston deeded 120 acres of the land to Thames, who in turn conveyed to W. S. Roberts, who had notice, at the time of his purchase, that Thames was in some way connected with the trustee's sale. Allston sold the remainder of the 240 acres to C. T. Allston, who in turn conveyed to W. B. Reeves, who bought in good faith and paid a valuable consideration, without notice of any of the aforesaid facts. Thames and wife realized $100 on a disposition of the engine. They sold other machinery for $225, and a lot of cattle, including some of those devised to Mrs. Stevenson, for $125. Some of the cattle, it is not shown how many, died. They also collected $10 on debts due the estate, and paid the Thomasson debt of $115. The dates of these transactions do not appear. The vidence is not sufficient to show that the property set aside to pay debts was adequate for that purpose, or that it was practical to convert it into money and pay the debts.

The children of the second marriage, by their guardians, brought this suit against Roberts and Reeves to recover the lands bought by them from Thames and Allston. There was a trial by the court without a jury, and judgment was rendered in favor of the plaintiffs against Roberts, and in favor of Reeves against them. Roberts, who had pleaded improvements made in good faith, was allowed the value thereof. The plaintiffs alone have appealed.

The contention of the appellants is that the property directed by the

will to be sold and applied to the payment of debts was sufficient for that purpose; that the executrix had no authority either to sell or mortgage the land in controversy, and that the mortgage being void for want of power on the part of the executrix to make it, the appellee Reeves acquired no title by his purchase, even though he bought in good faith, without notice, and paid a fair consideration. The contention of the appellee Reeves is that the property designed by the testator for the payment of his debts was inadequate; that the executrix had authority to sell the land in controversy to pay the debt owing to Johnson; that the power to sell included a power to mortgage, and that Reeves, being an innocent purchaser, was entitled to be protected, even if the mortgage was improvidently given.

The evidence shows that Reeves was an innocent purchaser, and that the creditor Johnson acted in good faith, with no purpose other than to secure and collect his debt, and without notice of any abuse of power by the executrix. Under these circumstances, the rights of Reeves and Johnson, acquired through the sale under the mortgage, will be preserved, if the executrix had authority to give the mortgage. The executrix may have abused her discretion in determining whether it was necessary to give the mortgage, or in selecting the property to be mortgaged, but the fact, if it be a fact, would not render the mortgage void, or affect the rights of good faith creditors and purchasers under it.

The question of fact as to whether the property devised to pay debts was sufficient and available for that purpose was, in effect, decided by the trial court against the contention of appellants, and the evidence is not such as to justify us in disturbing the finding.

There can be no doubt that, in certain contingencies, the executrix had authority to make a direct sale of the land in controversy for the purpose of paying Johnson's debt. If the property set apart to pay debts was insufficient, or was incapable of being utilized for that purpose, then it was the duty of the executrix to make appropriate sales of other property in order to raise the necessary funds. While the land in controversy was devised to the appellants, subject to the life estate of Mrs. Stevenson, the same was charged by the terms of the statute with the debts of the testator. Rev. Stats., art. 1869. They took the title, therefore, subject not only to the life estate of their mother, but also to the claims of the creditors. Stevenson could not, by testamentary disposition of property legally liable for the payment of his debts, exempt the same from such liability. Stevenson had a right, under the statute, to withdraw his estate from the control of the probate court and provide for the administration and settlement thereof by an independent executor. Rev. Stats., art. 1995. When the will was probated and the inventory and appraisement returned and approved and the executrix had qualified, she became vested with the powers of administration and entitled to possession of the assets of the estate. As such executrix she had authority, without seeking the aid or advice of the probate court, to do and perform all acts necessary in the course of a due and proper

administration of the estate. Her power to sell was clear, and it is immaterial, in this case, whether the power was prudently exercised.

The appellants insist that, even if the executrix had authority to make a direct sale of the land for the purpose of paying Johnson's debt, the mortgage given by her on the land to secure the debt is nevertheless void for the reason (1) that an independent executor has no authority, except where the power is conferred by the terms of the will, to mortgage any of the assets of the estate; (2) that if the executrix had authority to sell the land, it was a power that could be exercised by herself alone, and could not be delegated to another, as was, in effect, done by authorizing a sale by trustee; (3) that, as the note secured by the mortgage is more onerous in its terms than the original notes executed by the decedent, the executrix exceeded her powers, and the mortgage is null and void. We will dispose of the objections in the inverse order in which they are stated.

The third ground of objection is not tenable. In Michigan there is a statute which authorizes the mortgaging of the property of an estate by an administrator, acting under order of the probate court. In Griffin v. Johnson, 37 Michigan, 91, an administrator obtained license from the court to mortgage property belonging to the estate, and executed a mortgage under the license. The note given by him for the debt secured by the mortgage contained the usual attorney's fee clause, and, on a suit to foreclose, the validity of the mortgage was attacked on the ground that the administrator had no power to bind the estate to pay attorney's fees. The objection was overruled, and it was held that the mortgage was valid to the extent of the original debt, even if a recovery for attorney's fees should be denied. We think that the rule stated is sound, and that it is applicable to this case. As the creditor Johnson is not shown to have received a sum sufficient to satisfy his original debt, the provision of the note given to him by the executrix regarding the payment of interest at an increased rate is immaterial.

Neither is the second ground of objection well taken. In Terrell v. McGown, 91 Texas, 244, relied on by the appellants, it was held that an independent executor, having the discretionary power to sell, could not delegate the power to an agent in such manner as to confer on him authority to exercise the discretion vested in the executor. The proposition there announced is not applicable to this case. The discretion of the executrix in the case at bar was exercised when she determined to mortgage. The question is, whether the executrix had authority to mortgage, not whether she could delegate to another her power to sell.

If the mortgage was valid, then the creditor had the undoubted right to foreclose, and, on a foreclosure by judgment, could have the land sold as under execution. Howard v. Johnson, 69 Texas, 655. A sale by trustee is one of the usual methods of foreclosure, and has the same effect as a foreclosure by suit. Besides, the power of the trustee is not discretionary, but ministerial. All his duties are particularly defined, and the manner in which the same shall be performed are specifically

prescribed by the terms of the trust deed. The rights of the estate can be protected as well at the trustee's sale as at execution sale. If the executrix had authority to mortgage the land, her power to provide for foreclosure by the usual methods follows as a natural consequence. In Williams on Executors, page 803, it is said that when an executor with authority to pledge the assets of the estate does so, the pledgee may sell the things pledged, if they are not redeemed within the proper time.

The crucial question in the case is presented by the objection that the executrix had no authority to mortgage the land in controversy. The affirmative of the proposition was presented to our Supreme Court by an ex-chief justice of that tribunal in Smithwick v. Kelley, 79 Texas, 564. The opinion in the case was delivered by Chief Justice Stayton, but the case was disposed of on other grounds, and the question in issue here was not decided. An examination of the authorities accessible to us had not led to the discovery of a decision of the question by any court. We may, perhaps, be pardoned for expressing a sense of the difficulties under which we labor in attempting to solve the problem before us.

In Faulk v. Dashiell, 62 Texas, 642, relied on by the appellee Reeves, the power of an independent executor to mortgage was upheld, but the decision appears to be based on the construction given to the language of the will. In that case, the will conferred on the executor authority to sell, but no specific power to mortgage was given. The Commission of Appeals, in an opinion approved by the Supreme Court, held that the language of the will disclosed an intention on the part of the testator to grant to the executor the power to mortgage.

In Quisenberry v. Mortgage Company, 92 Texas, 247, relied on by the appellants, it was held that authority to sell did not include the power to mortgage. The decision was based on the principle announced in Faulk v. Dashiell, supra, that the intention of the testator will control. The language of the instrument there considered was held to evidence an intention on the part of the maker not to confer a power to mortgage. It may be said, in passing, that the question of the authority of an independent executor was not involved in that case.

In the case before us it is clear from the terms of the will that it was not the intention of the testator that the executrix should sell or otherwise dispose of the land in controversy, and the power of the executrix to sell at all arises from the duty imposed on her by law to provide for the payment of the debts of the decedent. It is therefore not a question of intention, but one of power. As it was the intention of the testator that the land should be neither sold nor mortgaged, and as conditions arose authorizing a sale, the issue is whether the authority to make sale embraced a power to mortgage.

It has been said by the Supreme Court of this State that an independent executor "may do whatever is necessary for the full and complete settlement of the estate which he might do under authority and order of the court, if he was charged with the administration subject to its control by the will." McDonough v. Cross, 40 Texas, 280. See

also, Roy v. Whitaker, 92 Texas, 355. The question naturally suggests itself, has the probate court authority to license an administrator to mortgage the assets of an estate?

We are of opinion that the question must be answered in the negative. It may be conceded that in jurisdictions where there are no statutory courts of probate, and estates are administered in courts of chancery, the chancellor may, in the exercise of his equitable powers, authorize the mortgaging of property of estates. And it may be further conceded that our probate courts, within the limits of their jurisdiction, may exercise the equitable powers of a court of chancery. Still more, it may be admitted that a general and comprehensive jurisdiction of all matters pertaining to estates of deceased persons is conferred on the probate courts of this State. But the jurisdiction must be exercised as directed by statute. Where the statute prescribes a mode of procedure as to any particular matter, the mode prescribed and no other must be followed, and as our statute provides for the raising of a fund to pay debts by sales of property, such funds must be raised by sale, and not by mortgage. It is said in Woerner on the Law of Administration, page 323, that probate courts, created by statute, "can exercise such powers only as are directly conferred upon them by legislative enactment, or necessary to carry out some power so conferred. Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, given either expressly or by implication, the whole proceeding is void; but where jurisdiction is conferred over any subject matter, and it becomes necessary in the adjudication thereof to decide collateral matters over which no jurisdiction has been conferred, the court must, of necessity, decide such collateral issues." The very question as to the authority of such courts to license an administrator to mortgage assets of the estate has been decided adversely to the claim of power in at least two states. Deery v. Hamilton, 41 Iowa, 16; Black v. Dressell's Heirs, 20 Kan., 153. The opinion in the case last cited was by Justice Brewer, now of the Supreme Court of the United States, a fact which adds weight to the case as authority. Moreover, the case was one of unusual hardship, for the estate had the benefit of the money obtained on mortgage. Nevertheless, the mortgage was held void.

It follows, therefore, that if the rule quoted from the opinion in McDonough v. Cross, supra, is a full and exact statement of the powers of an independent executor in all the relations he may occupy, such executor is without authority to mortgage the property of the estate he is administering. But neither in that case nor in the case of Roy v. Whitaker, supra, was the court considering the question before us, and no doubt the definitions there given of the powers of independent executors were intended as expressing the powers as such functionaries in the relations in which they there appeared. So construed, the expressions of the court in those cases are apt, sufficient, and appropriate. That they were intended to be so construed, we think is apparent from the learned opinion of Mr. Justice Brown in Roy v. Whitaker, wherein he cites and

approves the decisions in Langley v. Harris, 23 Texas, 569, and in Frisby v. Withers, 61 Texas, 138, in which it was held that an administrator under the will did not succeed to the rights of the executors named in the will to act in the capacity of trustees. We are also admonished of the danger of accepting so general a statement as a full, exact, and accurate definition of the powers of such representatives of estates, from the fact that similar statements, to the effect that the power of a community administrator is the same as that of an independent executor, may be found in our reports. Black v. Rockmore, 50 Texas, 98; Evans v. Taylor, 60 Texas, 425. Now, article 2227, Revised Statutes, confers on a community administrator powers which are nowhere given by statute to an independent executor. So, while the two offices approximate each other in power and similarity, the one can not be held to be, in all respects, the equivalent of the other. We think that the same observation applies to an independent executor and an administrator under a will. In this connection it is pertinent to call attention to the fact that a community administrator may mortgage the property under his control. Jordan v. Imthurn, 51 Texas, 276.

The question then recurs, whether the power of the executrix to sell the land for the payment of debts included the power to mortgage. It is certain that the power to mortgage can not be denied on the grounds that the executrix had no title to the land and possessed no sufficient estate in it. If she held the authority, without having any title or estate, to make an absolute sale, her lack of title and estate could not be urged as ground of want of power to mortgage. If she could convey the whole estate of the testator without being herself possessed of either title or estate, she could convey any part of the estate less than the whole, though she held neither title nor estate. The proposition is too clear for argument. It is true that if express power to sell was conferred either by will or statute, there might be room for discussion, but as the will and statute are silent in this regard, the question is beyond controversy. The power to sell for the purpose of paying debts is one of the functions of the office of an independent executor. The duty to provide for the payment of debts necessarily implies a power to make disposition of the assets of the estate to obtain the funds required.

At common law real estate was not subject to administration, and the executor took the legal title to the personal property of the testator, with power of disposition over it, while in Texas both real estate and personal property are alike subject to administration and charged with the debts of the decedent, though the title devolves on the devisees and does not vest in the executor. We have seen above that the executor in this State has authority to dispose of the property of the estate, either real or personal, for the purpose of paying debts, or to carry out the will of the testator, notwithstanding his want of title. That the power of disposition possessed by the common law executor did not depend on the title he held is disclosed by an examination of the nature of his title. In Carter v. Bank, 71 Maine, 448, it is said: "The interest which the

executor, as such, has in the personal estate of his testator is not the absolute title of an owner, else it might be levied on for his personal debts, but he holds in auter droit, as the minister and dispenser of the goods of the dead. As soon as he is clothed with a commission of the probate court, the executor is vested with the title to all the personal effects which the testator possessed at the instant of his decease; but the title is fiduciary and not beneficial, and his office is not that of an agent, but of a trustee." Thus it is apparent that the real power of disposition arises from the trust relation, and not from the possession of the dry legal title which appears to be conferred simply as an aid to a convenient execution of the power. That the power may and does exist without being accompanied by the title is established by our own decisions. The power of a common law executor to sell includes the power to mortgage. Carter v. Bank, supra. And the power to mortgage is not based on the ground that the executor has the legal title, but the reason for the rule is thus stated: "As the executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why, in the exercise of a sound discretion, and presuming that the language of the will does not require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets." 2 Williams on Exrs., 803. The effect of these authorities seems to be that an independent executor is not a mere agent with limited power to do a particular thing in a specified manner, but is a trustee with discretionary power to make absolute sales of property belonging to the State for certain general purposes, and that the authority to make absolute disposition of the assets carries with it and includes a power to mortgage. It follows that unless the power of an independent executor to mortgage is denied by our statutes, it must be held that he has such power.

It is certain that there is no statute which expressly prohibits him from exercising the power. Article 2007, Revised Statutes, can not be said to do so, even by implication, for the purpose of that article seems to be simply to relieve the executor of the necessity of applying to the court for leave to sell, and by its terms the article in questions applies only to sales where the power to sell is given by the will. The object of this provision of the statute was not to confer a power to sell. Article 2009, Revised Statutes, provides that, "The administration of an estate under a will shall in all respects be governed by the provisions of the law respecting the administration of intestates' estates, except when it is otherwise provided by law, or by the provisions and directions of the will." It is doubtful if this provision was intended to apply to independent executors. It appears rather to be intended to apply to a judicial administration by an administrator under the will, or by an executor without independent powers. It certainly can not have been intended to take from an independent executor his discretionary powers and subject him to the necessity of following the forms of the statute prescribed for the management of estates in the course of an ordinary

administration. We find no article of the statute which expressly or by necessary implication prohibits an independent executor from mortgaging the assets of the estate. On the other hand, we find that by article 1867, Revised Statutes, it is provided that, "The rights, powers, and duties of executors and administrators shall be governed by the principles of the common law, when the same do not conflict with any of the provisions of the statutes of this State." As at common law the power of an executor to sell included the power to mortgage, and as this principle of the common law is not in conflict with any statute of this State, the independent executor in Texas has the power of the common law executor to mortgage where, in the exercise of a sound discretion, such course is for the best interest of the estate.

The property of an estate in the hands of an independent executor is subject to seizure and forced sale at the suit of creditors. Rev. Stats., art. 1996; Roberts v. Comellee, 71 Texas, 15. The heirs and devisees, though not parties to the suit, are bound by the judgment against the executor and the sale under the judgment. Howard v. Johnson, 69 Texas, 655. Even the time allowed by law for the executor to answer is waived, if not insisted on by the executor. Lemmel v. Pauska, 54 Texas, 510. The assets of the estate in his hands are subject to garnishment. Weems v. Miles, 1 White & W. Con. Cas., sec. 1208. While it does not appeal to have been held that the assets could be seized under attachment, it would seem that such is the effect of the authorities cited. Therefore, so far as creditors are concerned, the independent executor stands in the shoes of the constituent. In these respects he holds upon the same terms as the testator. He may exercise the same discretion in selling to meet the emergency as the decedent could have exercised, if living. The property is unprotected in his hands, and occasion may arise when he can prevent a sacrifice of it only by pledging it as security for the debts.

The giving of a mortgage by an independent executor, instead of having the effect to bring about a forced sale of the assets of the estate, might result in preventing such sale, since the creditors, if not satified by mortgage, could procure judgment against the executor alone and have the assets seized and sold under execution under the judgment. The authority of such executor should correspond with his responsibility. The ordinary administrator, or the executor without independent powers, or the successor of an independent executor, do not occupy the responsible relation of the independent executor, hence the power may be refused them. The property in their hands is exempt from forced sale. No creditor can touch it until permitted to do so by order of the probate court. All sales must be approved by the court, and be made for a fair price. In such case the power to mortgage is not necessary, and because it was not given is no reason why it should be held that it was intended to be denied to the independent executor. It may be further noted, in this connection, that property in the hands of the common law

executor is subject to sale as under execution, and there the power to mortgage exists.

To say that the power is dangerous is begging the question. If it is too dangerous to be exercised, it can be prohibited by statute. Vast discretionary powers, which are everywhere recognized, are vested in independent executors, the wrongful employment of which would result disastrously to the rights of creditors and devisees. Our statute furnishes some measure of protection against such abuse of trust by authorizing the probate court to require bond of such executors in certain contingencies. The authority to mortgage is no more likely to be abused, and as adequate a remedy is provided against an improvident use of the power as in case of sale or the exercise of any other act of discretion.

But it may be said to be the duty of the executor to settle the estate, and that the giving of mortgages might have the effect to involve and extend, and not to settle, the administration. A mortgage given for purposes of speculation or investment, except where directed by the will, would be void, and a mortgage given even for a legitimate purpose, would be invalid, if not given in the exercise of a sound discretion. Creditors and purchasers claiming rights under such invalid mortgages would be protected only in case they had no notice of the indiscretion of the executor. The giving of a long time mortgage, or of mortgages having the effect to complicate the settlement of the estate, would generally carry on their face notice of their invalidity. So there is little practical danger in the proposition. The mere fact that the executor might abuse his discretion is no sufficient reason for refusing to concede to him the power.

We conclude that the mortgage given by the executrix in this case was not void, and that the appellee Reeves has a perfect title to the land claimed by him.

The only other question presented is whether the appellee Roberts was entitled to judgment for the value of his improvements. The contention of the appellants is that, as he bought with knowledge of the fact that Thames was in some way connected with the trustee's sale, he can not be held to have acted in good faith. We are of opinion that knowledge of said fact would not, as a matter of law, make Roberts' purchase and occupancy of the land in bad faith. He may not have known the legal effect of said fact and have bought the land and made improvements thereon in the belief that his title was perfect. He may have believed that the law permitted Thames to become a purchaser at such sale. The trial court held that, notwithstanding his knowledge of Thames' connection with the purchase at trustees' sale, Roberts believed and had good grounds for believing that he acquired a perfect title by his purchase from Thames, and that he acted in good faith in making his improvements, and we can not say that the holding is not justified by the evidence.

We find no error in the record and the judgment is affirmed.

Affirmed.

W. E. JOHNSON ET AL. v. S. A. DANIEL ET AL.

Decided June 1, 1901.

1.—Verification of Pleadings—Injunction and Trespass to Try Title.

Where plaintiffs sued in trespass to try title and for an injunction to restrain a judgment under which the land had been sold, a complaint against the judgment rendered therein in plaintiffs' favor, on the ground that their petition for injunction was not sworn to, is not well taken where the case was finally tried on an amended petition and no exception appears to have been made to the original pleadings (upon which a temporary injunction had issued) because not sworn to.

2.—Judgment by Default—Grounds for Vacating.

A judgment vacating and setting aside a former judgment by default is warranted by evidence showing that in such former suit there was, because of the existence of smallpox and quarantine, an oral agreement between counsel for the parties that the case should be passed and continued until the next term, whereby the defendants were prevented from attending court and of learning of such default judgment until after the term had expired.

3.—Excution Sale Set Aside—Inadequacy of Price—Notice.

Where the amount bid by plaintiff at his own execution sale is grossly inadequate, and the defendant in execution is possessed of personal property subject to execution sufficient to pay the debt and has not been called upon to pay the execution or to point out property, and a levy is made by the officer upon real estate and he fails to give notice thereof to the defendant, the jury is justified in finding that the constable's deed should be set aside.

4.—Same—Actual Notice of Sale.

Actual notice of the sale of land to the defendant in execution will not dispense with the necessity of notice to him of the levy of the execution which the statute requires the officer to give.

5.—Tender of Money Into Court—Judgment Awarding Execution Therefor.

Where plaintiffs, seeking to have an execution sale of land set aside, tendered into court the amount which defendant had bid for the land, and there was judgment in plaintiffs' favor setting aside the sale, and in defendant's favor for the amount of such bid, it was not a tenable objection to the judgment in favor of plaintiffs that the amount of the bid should have been left in the custody of the clerk, defendant being awarded execution therefor and it not appearing the plaintiffs were insolvent.

6.—Abandonment of Contract to Acquire Land.

See evidence held to warrant a verdict finding, in effect, that a contract by which the parties were to acquire land under the five years statute of limitations and one-half of it to be then conveyed by one of them to the other, who was to pay half the taxes from year to year, had been abandoned by such other party.

Appeal from Freestone. Tried below before Hon. L. B. Cobb.

Boyd, Compton & Anderson, for appellants.

Simkins & Mays and *R. M. Edwards,* for appellees.

BOOKHOUT, ASSOCIATE JUSTICE.—This suit was instituted on the —— day of March, 1900, in the District Court of Freestone County by Jeffie Daniel, joined by her husband, S. A. Daniel, Gus Daniel, and C. F. Daniel, as plaintiffs, against W. E. Johnson and H. H. Powell, sheriff

of Freestone County, in the nature of a bill in equity to vacate and set aside a judgment by default entered in cause No. 2376, styled W. E. Johnson v. S. A. Daniel, Jeffie Daniel, Gus Daniel, and C. F. Daniel, entered on the 13th of February, 1900, in favor of W. E. Johnson for 1400 acres of land out of the east half of the C. Chemar league in Freestone County, and to recover the title to said land. Plaintiffs excused their failure to appear and defend said suit on the ground of their sickness, and an alleged verbal agreement made by their attorney with the attorney representing W. E. Johnson, to the effect that said cause should be postponed until it could be ascertained whether the defendants, Daniels, could come into court, and if they could not, that the case would be continued at said February term.

Plaintiffs set up their several defenses to the suit against them by Johnson, alleged their ownership of the land, and that 800 acres of the land was the separate property of the plaintiff, Jeffie Daniel. The plaintiffs further alleged that Johnson claimed under a sale made by virtue of an execution issued on a judgment rendered in the justice court in his favor against S. A. Daniel for $86.70; that the levy and sale were made without notice to S. A. Daniel or any of the plaintiffs; without calling upon S. A. Daniel to pay the execution or point out a levy; that the land was sold to Johnson for $75, and the bid credited upon his execution; that the amount of the bid was grossly inadequate and insufficient to pass the title to the land, which was then and there worth $5000; and plaintiff tendered the amount of the bid in court, $75, for the benefit of defendant Johnson. The plaintiffs also set out an agreement made between Gus Daniel and W. R. Boyd for the acquisition of title to 1600 acres of the land, and alleged that Boyd abandoned the same. They alleged that S. A. Daniel was not insolvent in October, 1894, nor rendered insolvent by the conveyance of the 1600 acres to Gus Daniel. They prayed that the cloud cast upon their title by the deed to Johnson be canceled and removed. They asked that the judgment by default be set aside, and for a perpetual injunction against the enforcement of the same.

Defendants answered by general and special exceptions which do not appear to have been called to the attention of the court, general denial and special answer denying material allegations contained in plaintiffs' bill of petition, setting up title in W. E. Johnson, and attacking all the conveyances of plaintiffs as being fraudulent and without consideration. Defendants alleged the conveyance from S. A. Daniel to Gus Daniel for 1600 acres out of the east half of the Chemar league to be without consideration and made to hinder, delay, and defraud his creditors, and alleged that all the plaintiffs had notice thereof. W. R. Boyd, with leave of the court, intervened in the case, setting up his claim to 800 acres of land in controversy, and alleged that S. A. Daniel, having the apparent title to the land but asserting no claim thereto, an agreement was entered into between Gus Daniel and himself that Gus Daniel would procure a deed from his father, S. A. Daniel, to the 1600 acres of

land in the eastern part of the Chemar league, and would place it on record, and would enter upon the land and hold it for five years, cultivating and improving the same and paying all taxes thereon, and intervener was to fight all adverse claims that might be brought against the land, and Gus Daniel was to convey to him one-half of the 1600 acres of land, and said Gus Daniel was to have the 200 acres he improved as his homestead on his half of said land; that Gus obtained the deed from his father without any consideration, and entered on said land and made the improvements agreed upon; that said Gus Daniel subsequently transferred 800 acres of this land to his mother and 500 to his brother; that both of them took the land with full notice of intervener's rights; that this suit in the name of W. E. Johnson is now being prosecuted in the name of W. E. Johnson for the benefit of this intervener and his partners, R. N. Compton and J. G. Anderson, and prays that in the event W. E. Johnson is not entitled to recover all of the land, that intervener be allowed to recover one-half interest of the lands conveyed to Gus Daniel and Jeffie Daniel.

There was a trial and verdict in favor of the plaintiff against defendant and intervener, and judgment entered thereon setting aside said default judgment, perpetually enjoining the execution of the same, and canceling the constable's deed to W. E. Johnson as a cloud upon their title. Judgment was rendered in favor of W. E. Johnson and his assigns for $75 against all plaintiffs, and awarding execution for the same. The costs were taxed against defendant and intervener. Defendants and intervener filed a motion for new trial, which being overruled, they have prosecuted an appeal to this court. The facts sufficiently appear in the opinion.

1. The contention of appellants that it was error for the court to proceed to trial, and in not directing a verdict for defendants on the ground that plaintiffs' petition for injunction to vacate a judgment of that court was not sworn to, is not well taken. The pleading upon which this contention is based is the second amended original petition, filed by plaintiffs on September 12, 1900, praying that the judgment in favor of Johnson be canceled and set aside and that he be perpetually enjoined from enforcing the same, and that plaintiffs have judgment removing the cloud from their title. It appears from this pleading that an original petition and a first amended original petition had prior thereto been filed by the plaintiffs. The record does not contain any of the pleadings of plaintiffs filed prior to the time of filing their second amended original petition. It may be presumed from the record that upon filing the original petition a temporary writ of injunction was issued. Johnson answered on September 3, 1900. W. R. Boyd filed his plea of intervention on September 5, 1900. No motion was made by defendants or intervener to dissolve the temporary injunction, nor was there any objection made to the pleadings on the ground that they were not sworn to. Article 2292, Revised Statutes, requiring a petition for injunction to be sworn to, applies where a temporary injunction is

sought during the pendency of the suit and prior to final trial. Edrington v. Allsbrooks, 21 Texas, 189; Echols v. Daniels, 16 Texas, 137; Love v. Howell, 67 Texas, 19.

In the condition of the record we must presume in support of the regularity of the proceedings that the original petition was sufficient to authorize the issuance of the temporary writ. Upon final trial a judgment awarding a permanent writ of injunction may be rendered, if, under the facts, plaintiff is entitled to the writ, although the petition upon which the case is tried is not sworn to.

2. It is contended by the appellants that the court erred in failing and refusing to direct a verdict for the defendants upon the facts, and especially in not giving defendants, under proper instruction, 600 acres out of the 800 acres owned by S. A. Daniel and wife, Jeffie Daniel, and for the balance of 514 acres claimed by plaintiff C. F. Daniel. If there is evidence which justified the jury in rendering the verdict they did, we are compelled to find against this contention. The petition sought to have the judgment by default, rendered on the 13th day of February, 1900, in favor of W. E. Johnson and against S. A. Daniel, Jeffie Daniel, and Gus Daniel, set aside and annulled. The term of the court during which said judgment was rendered had terminated. In such a case relief will not be granted unless the party seeking it can show that he was prevented from making a valid defense to the action by fraud, accident, or the act of the opposite party unmixed with fault on his part. Plummer v. Power, 29 Texas, 14; Harn v. Phelps, 65 Texas, 597; Merrill v. Roberts, 78 Texas, 30.

The ground for setting aside the judgment was the existence of smallpox in the family of the plaintiffs which prevented them from attending court, and an agreement by counsel representing the parties that the case should be passed to ascertain if plaintiffs could attend court, and if not, the cause was to be continued for the term. There was evidence both pro and con on the issue as to whether such an agreement had been made. This issue was submitted to the jury in a charge to which no objection is made, and the jury found in favor of the agreement. There is evidence supporting their findings. It was for the jury to settle the conflict in the evidence, and they having done so we do not feel authorized to disturb their verdict. Chase v. Neal, 83 Texas, 333; Sullivan v. Zardeneto, 30 S. W. Rep., 95; Blum v. Watson, 19 S. W. Rep., 357; Insurance Co. v. Lee, 19 S. W. Rep., 1030.

The evidence is uncontradicted that the Daniels were unable to attend court at the February term owing to the existence of smallpox in their family and the establishment of a quarantine against that neighborhood. It is shown that the defendants in the default judgment, and their attorney, had no knowledge that the judgment had been rendered, and did not learn of the same until after the adjournment for the term, and this suit seems to have been istituted without delay upon ascertaining that fact.

3. It is insited that the deed from Gus Daniel to Jeffie Daniel for

800 acres of the land shows on its face to be a conveyance to the community estate of S. A. and Jeffie Daniel, and that the husband, S. A. Daniel, ought not to be permitted to ingraft a trust upon the conveyance in order to defeat the title of the purchaser under execution against him. This contention does not fairly arise under the record. The court charged the jury as a matter of law that said deed vested the title of said land in the community estate of S. A. and Jeffie Daniel. The jury found, under other instructions which are not complained of, for appellee upon the issue that the law had not been complied with by the officer in making the levy and sale of the property and that the inadequacy of consideration was caused thereby.

4. It is contended that the court erred in overruling the motion for new trial, both of defendant and intervener, because the verdict of the jury is contrary to the law and evidence, in that it was proved that defendant W. E. Johnson had a valid judgment against S. A. Daniel in the Justice Court, precinct No. 1, Freestone County; that the issuance and levy of the alias execution and sale thereunder and the constable's deed, were all regular and conveyed a good title to the purchaser. W. E. Johnson obtained a judgment against S. A. Daniel for $86.70 on April 25, 1898. On October 10, 1898, an alias execution issued upon this judgment, and on the same day was levied upon the land in controversy. At the sale Johnson bid in the land, 1400 acres, for $75, and the bid was placed as a credit upon the execution. At the time of the levy S. A. Daniel had personal property subject to execution out of which the execution could have been made. The officer making the levy knew where Daniel lived, was acquainteod with him, but did not call upon him to pay the execution or to point out a levy. S. A. Daniel did not receive any notice of the levy from the officer making the same. The 1400 acres of land were at the time of said sale of the value of $5000. The court charged the jury that if they believed from the evidence the land when levied on, outside of the 200-acre homestead tract, was of such value that $75 would be grossly inadequate as consideration therefor, that is, such a price as no person of common judgment would regard it as fair, reasonable or honest; and if they further believed that S. A. Daniel was not notified of the levy of Johnson's execution by the constable, and was not called upon by said constable to pay the execution or point out other property for levy, and by reason of such facts the land was sold for less than it would have been, had said irregularities not existed, then the sale by the constable should be set aside, and in such event they should find for the appellees, and also find for Johnson the sum of $75 tendered in court by appellees. Appellants have not assigned error complaining of this charge, and they did not request any additional instructions of the court below. The jury found in favor of the appellee, setting aside the constable's deed. Where, as in this case, the amount of the bid is grossly inadequate, and the defendant in execution is possessed of personal property subject to execution sufficient to pay the debt, and has not been called upon to pay the exe-

cution or to point out a levy, and a levy is made by the officer upon the real estate, and he fails to give notice of the levy to the defendant in execution, the jury is justified in setting aside the constable's deed. Weaver v. Nugent, 72 Texas, 274; Irwin v. Furguson, 83 Texas, 495; Allen v. Pierson, 60 Texas, 604; Taul v. Wright, 45 Texas, 388; Jones v. Pratt, 77 Texas, 210.

Appellants, however, contend that prior to the sale S. A. Daniel had actual notice of the levy and that a sale was about to be made. The evidence shows that a few days prior to the sale S. A. Daniel learned that the land had been levied upon, and on the day of sale he and his son Gus went to the town of Fairfield to see the attorney who had represented him in that suit, and who is one of the appellants herein, in reference to the levy and sale, and was advised by said attorney to pay no attention whatever to the matter, but let the land sell, as the purchaser would not get any title. Acting on this advice he took no steps to stop the sale. Gus Daniel testified that he wanted to settle the execution, if the sale would pass a title. He was assured by the attorney that no title would pass by the sale. Actual notice of the sale to the defendant in execution will not dispense with the notice required by statute. The appellants can not insist, in view of the facts, that plaintiffs are estopped from attacking said levy and sale by reason of the fact that S. A. Daniel had notice of the levy before the sale was made.

It is further insisted that the $75 tendered by plaintiff to the defendant in court should have been left on deposit with the clerk. The defendants recovered judgment for this sum against all of the plaintiffs, and they were awarded execution therefor. The record does not show that the plaintiffs are insolvent. We conclude that these contentions are without merit.

5. It is contended that the court erred in overruling the motion of intervener, W. R. Boyd, for a new trial, for that the evidence showed a contract between Gus Daniels and W. R. Boyd by which Boyd was to get one-half of the 1600 acres of land, and it was not shown that the intervener had failed to carry out his part of the contract, or that he had abandoned the same. There was evidence from which the jury were justified in finding an agreement between Gus Daniel and W. R. Boyd, made in 1894, to the effect that Gus Daniel was to procure a deed from his father, S. A. Daniel, to 1600 acres out of the east half of the Chemar league in Freestone County, put the deed on record and move upon the land and occupy it for five years; that Boyd was to defend any and all suits that might be brought against the land, and pay one-half the taxes each year assessed against the land, and that at the end of the five years Gus Daniel was to deed Boyd one-half the land, 800 acres. The other one-half of the taxes were to be paid by Gus Daniel. Gus Daniel did procure a deed from his father and had it recorded and moved upon the land. When the first taxes became due, he sent to Boyd and requested him to pay his one-half of the taxes and Boyd refused to pay. Boyd has never paid any of the taxes. The taxes were

paid by Gus Daniel. Gus Daniel dealt with the land as his own. In January, 1898, he sold and conveyed 800 acres of the land to his mother. Between January 1, 1899, and February 1, thereafter, Gus Daniel, by three separate conveyances, sold and conveyed to C. F. Daniel 514 acres of the land. C. F. Daniel conveyed 200 acres of the 514 acres to Watson Bros. At the time of these several conveyances the purchasers consulted Boyd as to the Gus Daniel title. He advised them that it was good. R. Harding had a judgment against Gus Daniel, and on December 6, 1898, W. R. Boyd, who was Harding's attorney, had an execution issued and levied upon the 1600 acres of land as the property of Gus Daniel. C. F. Daniel, at the request of Gus, paid it off and had the judgment transferred to him. The money was paid to Boyd. This was before C. F. Daniel purchased the land from Gus Daniel.

There is evidence to the effect that when S. A. Daniel conveyed the 1600 acres to Gus Daniel he was indebted to Gus, and that the conveyance was made in settlement of said indebtedness. There is evidence that when Mrs. Jeffie Daniel purchased the 800 acres from Gus she paid value for the same out of funds received by her for the sale of a former homestead, and that she had no notice of the agreement between Gus Daniel and W. R. Boyd in reference to the land. The issue as to whether the agreement between Boyd and Gus Daniel was made, and whether it had been abandoned by Boyd, and whether Mrs. Daniel and C. F. Daniel had notice of it at the time of their respective purchases and whether they paid value without notice of the same, were all fairly submitted to the jury.

The charge of the learned trial judge covered every phase of the case and was not objected to, nor were any additional instructions requested by appellants. The jury found in favor of the appellees on all the material issues, and there is evidence supporting their verdict. We conclude that the court did not err in overruling the intervener's motion for new trial.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

PATRICK ROWAN v. J. W. RAINEY.

Decided June 1, 1901.

1.—Trespass to Try Title—Improvements in Good Faith by Heir—Possession.

The statute in reference to improvements on land made by the defendant in good faith and under claim of title does not restrict a recovery for their value to one who claims title to the land by purchase, but applies also in the case of an heir who, ignorant of a prior unrecorded deed by his father, took possession in good faith, after such inquiry and search of the records as an ordinarily prudent person would have made; and his claim is not affected by the fact that he received possession from his mother, who was not a possessor in good faith, his own possession having continued for one year. Rev. Stats., art. 5277.

2.—Same—Unrecorded Deed of Ancestor—Statutory Construction.

The statute making an unrecorded deed of the ancestor binding on the heir is not intended to apply to and cut off a claim for improvements made by an heir in good faith and without notice on land that had been sold by the ancestor. Rev. Stats., art. 4640.

Appeal from Harrison. Tried below before Hon. W. J. Graham.

M. R. Geer, for appellant.

T. P. Young, for appellee.

TEMPLETON, ASSOCIATE JUSTICE.—S. D. Rainey and wife owned a block of land situated in the city of Marshall. In 1885 they sold a lot out of the block to appellant Rowan. All the parties then lived at Marshall. Rowan did not have his deed recorded until 1900. In 1892 he removed to Titus County, where he has since resided. Rainey died in 1891. The lot in question and the adjoining lots which had not been sold were unimproved, and in 1895 Mrs. Rainey rented same to Whaley, who inclosed the lots, including the one in controversy, and used the same as a cow pasture. Mrs. Rainey died in 1898. Two sons, the appellee and another, were the sole heirs of Rainey and wife. Soon after Mrs. Rainey's death appellee bought his brother's interest in part of the estate, the Rowan lot being embraced in the conveyance. The consideration was a credit on an indebtedness owing to appellee by his brother. Appellee shortly thereafter, and before the filing of Rowan's deed or the bringing of this suit, improved the Rowan lot by erecting thereon a small dwelling house with the usual appurtenances. Rowan sued appellee in trespass to try title and recovered the land. Appellee pleaded his improvements and was allowed the value thereof. Rowan has appealed.

On the issue of improvements in good faith it was shown, in addition to the facts above stated, that appellee resided in Tom Green County, Texas, at the time Rowan bought the lot, and that he has not lived at Marshall since then; that after his mother's death, and before he bought out his brother, he had an experienced abstractor to examine the deed records of Harrison County to see what lands belonged to the estates of his father and mother, which examination showed that the title to the lot in controversy was in the said estates. It further appears that appellee did not know, until the Rowan deed was filed for record, that the lot had been sold, and that he had no knowledge of any facts which would have put him upon inquiry as to the sale. When appellee bought from his brother, and when he went into possession, and when he made the improvements, he believed and had every reason to believe that the lot had not been sold and that it belonged to the estates of his father and mother, and that he had inherited an undivided one-half interest in the lot from his parents, and that the deed from his brother conveyed to him a good title to the remaining interest. Acting on such belief, appellee

went into possession and made the improvements in good faith, without any knowledge whatever of any adverse claim to the land.

It is provided by article 5277, Revised Statutes, that a defendant in an action of trespass to try title who has had adverse possession in good faith of the premises in controversy for the required time, and who has made permanent and valuable improvements thereon, may set up a claim for such improvements. Appellant contends that appellee was not a possessor in good faith of the lot in question because his mother, from whom he received possession, was not a possessor in good faith, and because, by virtue of article 4640, Revised Statutes, the deed to Rowan, though not recorded, was binding on Rainey and wife and on their heirs. Conceding that Mrs. Rainey was not a possessor in good faith, and assuming that her possession could not be tacked to the possession of appellee, still, as appellee had possession himself for more than one year before the bringing of this suit, such facts would not have the effect to bar appellee's claim. The question is whether appellee himself took and held possession in good faith for the required time, and on this issue the testimony is conclusive in his favor. It was unmistakably shown that appellee, when he took possession and made the improvements, believed that the lot was his own, and had such grounds for his belief as would be satisfactory to a person of ordinary prudence, and that he had made such inquiry concerning his title as an ordinarily prudent person would and should have made. In such case the improver is entitled to protection. Holstein v. Adams, 72 Texas, 490. Appellee's claim can not be defeated on the ground that those under whom he claims were not possessors in good faith, unless he had notice of that fact. True it is that he was not a purchaser for value of the lot in controversy, but he had as much reason to believe himself the owner of the lot as one who had bought and paid for it. He acted as a reasonably prudent person would have acted in assuming the rights of ownership over the premises, and must be held to be a possessor in good faith and entitled to pay for his improvements. The fact that the deed of his ancestors was binding on him on the question of title would not prevent him from being a possessor in good faith, or bar his claim for improvements. That the deed, though unregistered, was sufficient to defeat his claim of title, is not disputed. But the statute can not have been intended to apply to a claim for improvements made by an heir in good faith and without notice, on land that had been sold by his ancestor. Such a construction would be in conflict not only with the spirit of our law and the principles of equity, but with the statute which authorizes a recovery for improvements so made, without reference to the source of the defendant's claim of title. The statue does not restrict a recovery to one who claims title by purchase. We conclude that the judgment should be affirmed.

Affirmed.

Rainey, Chief Justice, did not sit in this case.

MRS. ELIZABETH A. WALKER v. MRS. EFFIE NIX ET AL.

Decided June 15, 1901.

Deed—Delivery—Intent of Grantor.

To show delivery of a deed it is necessary not only that it should appear that the instrument had been placed in the control of the grantee, but that the grantor intended it should become operative as a conveyance; and a charge to the jury, as to what would constitute a delivery, pretremitting the question of such intention, was erroneous.

Appeal from Lamar. Tried below before Hon. E. S. Chambers.

J. C. Hodges, for appellant.

Allen & Dohoney, for appellees.

BOOKHOUT, ASSOCIATE JUSTICE.—This suit was brought in the District Court of Lamar County by plaintiffs, Mrs. Effie Nix, joined pro forma by her husband, Edward Nix, against defendant, Mrs. Elizabeth A. Walker, to remove cloud upon title to sixty-eight acres of land.

The petition alleges that on November ——, 1897, defendant executed and delivered to plaintiff, Effie Nix (then Effie Walker) and H. E. Walker a certain deed of gift to the sixty-eight acres in controversy, and that said deed had been lost or destroyed before record, and that the legal title appeared of record in defendant, and prayed for removal of said cloud, and for general and special relief.

Defendant answered by general demurrer, general denial, plea of not guilty, and specially that defendant signed and acknowledged an instrument purporting on its face to be a deed to said grantees reserving to herself a life estate in said lands, but that she never delivered same, and kept possession of same, intending it to be a will, and that it should be delivered to said grantees on her death; that she burnt said instrument on —— day of April, 1900. Also, that plaintiffs' claim to said land was a cloud on her title, and she prayed for general and special relief in all of said pleas, and that she be quieted in her possession. Plaintiffs, by way of supplemental petition, pleaded general demurrer, special exceptions and general denial. A trial resulted in a judgment for plaintiffs for the land, but with life estate reserved to defendant. Defendant prosecuted an appeal.

The only controverted question which we deem it necessary to discuss is whether there was a delivery of the deed executed by Mrs. Elizabeth E. Walker to Effie Nix, nee Walker, and her brother H. E. Walker. Upon the question of delivery the court instructed the jury as follows: "To constitute a delivery it is not necessary that the deed should be placed in the grantee's hands but it is necessary that it should be and was put into the control of the grantees, and that the grantees accepted the same,—that would be a delivery. If you believe from the evidence

that the defendant placed said deed or instrument in a trunk in the house where she and Effie Nix had access to, and told Effie Nix that she could get said deed or instrument at any time she desired, and have it recorded if she wanted to, then that would be a delivery."

This charge is assigned as error. Whether or not the placing of the deed in a trunk to which the grantee had access in the house in which she was then living, and the grantor telling her that she could get the same and have it recorded whenever she wished to, would constitute a delivery of the deed, depends upon the intention of the grantor at that time. If she intended to surrender control over the deed and place the same in the possession and control of Effie Nix, then there was a delivery. The charge assumed that, if she performed the acts and made the statements therein set out, she intended thereby to deliver the deed. This inference does not necessarily follow. The jury might have reached the conclusion that she did not intend to deliver the deed. The question should have been left to the jury. It was necessary that the deed should not only have been placed in the control of the grantee, but that the grantor intended that it should become operative as a conveyance. Steffian v. Bank, 69 Texas, 517; Gonzales v. Adoue, 94 Texas, —, 58 S. W. Rep., 951; McCartney v. McCartney, 94 Texas, —, 55 S. W. Rep., 311; Griffis v. Payne, 47 S. W. Rep., 973, 22 Texas Civ. App., 319; Veal v. Fortson, 57 Texas, 488; 5 Am. and Eng. Enc. of Law, 1 ed., 445 et seq.; 1 Dev. on Deeds, 223, 225-228, 231, 252, 253, 263, 285.

We conclude there was error in the charge, and that for such error the judgment must be reversed.

Reversed and remanded.

FIRST DISTRICT, 1901.

WESTERN UNION TELEGRAPH COMPANY v. L. B. DOWNS.

Decided April 1, 1901.

1.—Telegraph Company—Negligence—Wrong Name of Office and Town.

Where a telegraph company has for many years maintained an office at New Waverly, but on its printed list of offices kept for the guidance of its operators the town was put down by the name of Waverly, and a message was tendered directed to New Waverly, which the operator declined to receive, not knowing that the company had an office at New Waverly, the telegraph company was liable for the damages resulting from such failure to receive and transmit the message.

2.—Same—Ordinary Care.

It is want of ordinary care for a telegraph company to adopt an arbitrary name for one of its offices differing from the actual name of the town in which it is located, and to furnish its agents only with such arbitrary name to guide them in determining what messages to accept.

3.—Same Contributory Negligence.

Where a telegraph operator had refused to receive and forward a message announcing to a party the serious illness of his mother, the failure of the person offeringthe message to then forward it by telephone was not contributory negligence where such person did not know there was telephone connection with the point to which the message was addressed.

Appeal from Walker. Tried below before Hon. J. M. Smither.

Norman G. Kittrell and *George H. Fearons,* for appellant.

Ball, Dean & Randolph, for appellee.

GILL, ASSOCIATE JUSTICE.—Plaintiff, L. B. Downs, brought this suit against the defendant telegraph company to recover damages for the alleged refusal on the part of the company to transmit and deliver to plaintiff the following message: "L. B. Downs, New Waverly, Texas: Your mother is very sick. Come at once. (Signed) W. J. Worthington."

Defendant answered by general demurrer and general denial, and alleged that it had no such office at New Waverly in all its list of offices. That the only office of such a name it had was the office of "Waverly," in Walker County, Texas, and having no such office as New Waverly, it was not authorized to receive a message directed to such office, nor to contract to send it. Defendant further answered specially that plaintiff had no affection for his mother, but had driven her from his house and refused her shelter. Defendant further pleaded contributory negligence in that plaintiff's agent who tendered the message for transmission could, by the use of long distance telephone have communicated with plaintiff in time to have had him at the bedside of his mother before her death, and that a failure to do so was contributory negligence which ought to bar a recovery.

Trial by jury resulted in a verdict and judgment for plaintiff, from which defendant has appealed. The facts briefly stated are as follows: Plaintiff's mother was living with W. J. Worthington, about fourteen miles from Navasota, Texas, and plaintiff was a physician living at New Waverly in Walker County, Texas, and only a few hundred yards from defendant's telegraph office at that point. The distance between New Waverly and Navasoto was about forty-five miles. There is a village called Waverly situated about eight miles east of New Waverly, which had been in existence much longer than the latter town. New Waverly is situated on the International & Great Northern Railroad, and is about thirty years old. The railway station is marked by the railway company "Waverly," and the telegraph office, which has been maintained there for many years, is set down in the telegraph company's books as "Waverly." The name of the town is in fact New Waverly, and has been so known over Walker and adjoining counties since its establishment. Navasota is situated in Grimes County, which

adjoins Walker County. The United States postoffice at New Waverly is "New Waverly postoffice," letters addressed simply to Waverly going to the older town east of that point. Defendant's agent at Navasota had been on duty at that point only a few months, and having been reared in a different part of the State, knew of no such town as Waverly or New Waverly, but in sending messages was governed by the offices as entered alphabetically in a book furnished her by the company for her guidance.

On November 17, 1899, plaintiff's mother became very ill at the home of W. J. Worthington, and he sent one Flynt to Navasota with a message to be transmitted over defendant's wires to plaintiff at New Waverly, giving him the money to pay the usual charges. Flynt arrived at Navasota at night, and the telegraph office being closed, he tried to get the railway operator to send it, but his request was refused. Next morning he tendered the message to the telegraph company's agent for transmission. She looked in the list of Offices furnished her by the company, and finding no such office as New Waverly, refused to accept the message for transmission. Flynt then hurried back to Worthington and reported the facts. Worthington at once sent a messenger on horse back across the country to apprise plaintiff of his mother's condition. Upon receipt of the advice he hastened to Worthington's house, but when he arrived his mother was dead. In her last hours she continually called for him and wanted no doctor but him. Had the message been sent by defendant with reasonable dispatch when tendered, it would have reached plaintiff in time for him to have been with his mother prior to her death. Neither Worthington, who sent the message for transmission, nor Flynt, who carried it to Navasota, knew that the two towns were connected by long distance telephone.

It is the duty of telegraph companies by reason of their public character to accept and transmit messages without discrimination. Crosswell, Law of Elec., sec. 450. We think it logically follows that, subject to reasonable regulations which the law permits them to prescribe, they must be held to the exercise of ordinary care in the discharge of this imposed duty. We are unable to perceive any distinction in this respect between a willful refusal to accept and transmit a message and a negligent failure so to do. The consequences are the same. In this case, as has been seen, the company had maintained an office in New Waverly and telegraphic connection between the two towns for many years, and must, in the nature of things, have sent many messages between the two places. Worthington, when he sent the message to Navasota from a point fourteen miles in the interior had the right to assume that his message would be accepted and transmitted with reasonable dispatch. The failure of plaintiff to reach the bedside of his mother was the immediate consequence of the failure of the company to discharge the duty which the law imposed.

We think it also logically follows that the company must exercise ordinary care to furnish its agents with the necessary information as

to the names of the towns in which their offices are located, so that may be able to know what messages to accept. This duty is not discharged by adopting an arbitrary name for one of its offices, differing from the actual name of the town in which it is located. Nor can the public be held to a knowledge of the name so arbitrarily adopted by the company. We think the evidence ample to show that the company was negligent in failing to furnish its agent with the necessary information, and that the agent was negligent in not advising Flynt that it had an office called "Waverly."

We are of opinion that the facts do not present the issue of contributory negligence, and that the court did not err in refusing to give the special charge submitting that issue. Worthington lived fourteen miles in the country. His messenger was authorized to send a telegram, not a telephone message. Neither he nor Flynt knew of the telephone connection. When Flynt returned, Worthington discovered that his messenger had already traveled fourteen miles and return to no purpose. In his ignorance of the existence of the telephone, which had been established only four months, he naturally concluded the speediest way to inform the son of the impending death of his mother was to send a messenger, as he did. It might also be pertinently asked how could a countryman be expected to know of the telephone connection when the company's own agent did not know of the telegraph connection between the two towns.

We find that the plaintiff suffered damages in the sum found by the jury, and no error being found in the record, the judgment is affirmed.

Affirmed.

Writ of error refused.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY v. GEORGE WASHINGTON ET AL.

Decided January 21, 1901.

1.—Limitations—Minor—Suit by Next Friend.

The bringing of a suit by the father as next friend to recover damages for injuries to a minor, and its subsequent dismissal for want of prosecution, does not put the statute of limitations in motion against the claim of the minor from and after the date of such dismissal.

2.—Argument of Counsel—Immaterial Error.

Remarks of counsel to the jury asserting facts of which there is no evidence in the case are improper, but will not necessitate a reversal where it is not shown that they had any effect on the jury, and the verdict is not against the preponderance of the evidence.

3.—Limitations—Plea of Minority in Reply.

Where defendant sets up in one plea limitation of one and two years, a plea of minority by plaintiff in reply is sufficient where it mentions only the plea of two years, but sets up facts sufficient to meet the plea of one year as well.

4.—Evidence—City Charter—Authentication.

The charter of the city of Houston is a public act of the Legislature of which

the court will take judicial notice, and by virtue of sections 36 and 53 thereof a printed book purporting to contain the city ordinances and to be published by authority of the city council, is admissible in evidence as proof of such ordinances without further authentication.

5.—Action for Personal Injuries—Issue of Unavoidable Accident Raised.

See the opinion for evidence in an action for personal injuries to a boy by a moving train held to raise the issue of unavoidable accident and to require its submission to the jury upon defendant's request.

6.—Judgment for Damages—Disposition of Proceeds.

Where plaintiff recovers a judgment for damages resulting from personal injuries, defendant will not be heard to complain that it directs one-half the amount thereof when collected to be turned over to counsel for plaintiff.

Error from Wharton. Tried below before Hon. Wells Thompson.

G. G. Kelley and *A. L. Jackson,* for plaintiff in error.

J. C. Baldwin, J. V. Meek, W. L. Hall, and *R. M. Brown,* for defendants in error.

PLEASANTS, ASSOCIATE JUSTICE.—This suit was instituted by the defendant in error, George Washington, as the next friend of the minor, James Washington, to recover of plaintiff in error damages for injuries to the person of said minor alleged to have been caused by the negligence of plaintiff in error.

The original petition was filed on the 3d day of January, 1899. In the first amended original petition, filed on the 12th day of April, 1899, and upon which the case was tried, plaintiffs allege that the defendant railway company had constructed and was operating its railroad on Colorado street in the city of Houston, which street ran in an eastwardly and westwardly direction through said city, intersecting Winter street at right angles; that at the intersection of said streets, the defendant had constructed certain plank walks for the use of pedestrians in passing along Winter street and crossing defendant's track, and that at the time of the injury complained of, the planks constituting this walk adjacent to the track had become old, worn, and rotten, and that on the 25th day of March, 1896, while James Washington, a negro boy of immature judgment, then about ten years old, was walking on the plank sidewalk, he stepped upon the same for the purpose of passing over the defendant's track and right of way, and one of the planks broke, causing his foot to slip and become fastened in one of the holes; that while James Washington was trying to extricate his foot, one of the defendant's engines with cars attached to it approached from the west at a high and dangerous rate of speed, about thirty miles per hour, which speed was in violation of the city ordinance of the city of Houston, prohibiting a speed in excess of six miles per hour; that the defendant's servants in charge of the engine and cars approached without ringing the bell or giving any warning whatever of the approach of the said engine and cars, and failed to keep a proper lookout for the purpose of dis-

covering persons who might be upon the defendant's track, or if said servants did in fact see the said James Washington in his perilous position, then, nevertheless, they made no effort whatsoever to stop the engine and cars, but negligently run upon and over James Washington, mashing and cutting off both his feet below the knees, and thereby causing him serious and permanent injury and physical and mental anguish, to his damage in the aggregate sum of $25,000, for which judgment was prayed in his behalf.

The defendant's first amended original answer, filed May 3, 1900, contained: (1) A general demurrer. (2) A general denial. (3) A special plea setting up the statute of limitation of one year and the statute of limitation of two years in bar of plaintiff's action, the same having accrued, if at all, on the 25th day of March, 1896, and this action having been instituted by the filing of plaintiff's petition on the 3d day of January, 1899. (4) Contributory negligence on the part of James Washington, consisting in his failure to use his senses and his judgment to discover the approaching train and avoid it, or in stepping upon defendant's track, or getting into a dangerous position and placing himself near the cars or in front of the approaching train of the defendant, knowing of its approach, and at such time and under such circumstances as to bring about and contribute to his injury. (5) Contributory negligence on the part of James Washington, in this, that while the cars of defendant were passing over its track, the said James Washington trespassed upon its track and roadbed; that he then and there became or attempted to become a trespasser upon the moving cars of defendant, and while the said cars were in motion, he, in a reckless and negligent manner, took hold of some portion of one of defendant's cars and got upon the car, or endeavored to get upon it and ride; and that, by reason of his reckless and heedless conduct, and by reason of the motion of the cars at the time, James Washington was thrown or fell under the edge of the car so that his foot or legs were mashed or injured, and that such conduct on the part of James Washington was not only grossly negligent and reckless, but was in violation of the laws of the State of Texas; all of which reckless and unlawful conduct on his part directly contributed to and caused his injury.

To this answer plaintiff filed his first supplemental petition which contains the following: "And specially answering the plea of the statute of limitation of two years, plead by the defendant, says that the same sets up no defense to this plaintiff's suit, for the reason that on the date of the injuries to plaintiff he was a minor 10 years of age; that he is now only a minor of 15 years of age, wherefore he says that said plea sets up no defense to the cause of action plead for James Washington, wherefore he prays judgment."

The defendant's first supplemental answer, filed May 3, 1900, in response to plaintiff's first supplemental petition, alleged that on the 4th day of April, 1896, the said James Washington, by his father and next friend, George Washington, instituted a suit on the identical cause of

action, and alleged injury forming the basis of the suit at bar; that said suit was filed by Messrs. Wilson & Wood, as attorneys of record for plaintiff and his next friend, in the District Court of Harris County, Texas; that this defendant appeared in said cause and filed its answer therein, and that on the 5th day of October, 1896, plaintiff failing to further insist upon or prosecute its suit in said Harris County District Court, the same was dismissed for want of prosecution, and was stricken from the docket; that if any disability of minority ever existed, as alleged by plaintiff, relieving James Washington from the bar of the statute of limitation, nevertheless such disability was removed and waived by the institution and prosecution and subsequent abandonment and dismissal of the said suit in the District Court of Harris County, Texas. That the suit in Harris County District Court, after being dismissed, was never reinstated, and that from and after the date of its dismissal, and by virtue of the proceedings had in said cause, the statute of limitation began to run and has continued to run against the said James Washington's right of action, if any he has or ever had, and against his right, if any he ever had, to sue by the said George Washington as next friend, and against the right of the said George Washington to prosecute the same; and defendant in this connection renewed its plea of the statute of limitation of one year and of two years in bar of this action.

To this supplemental answer plaintiff filed a general demurrer, which was sustained by the court, to which ruling the defendant excepted.

Upon a trial of the cause before a jury on the 7th day of May, 1900, a verdict and judgment was rendered in favor of plaintiff for $10,000, and it was further adjudged by the court that one-half of the amount of said judgment was owned by Baldwin & Meek, and it was ordered that when said judgment was collected by the sheriff, or turned into the registry of the court, that one-half of same be turned over to said Baldwin & Meek and their receipt be taken for the same.

Defendant's motion for a new trial in the court below having been overruled, it prosecutes this writ of error, and seeks a reversal of the judgment of the court below upon numerous grounds set out and urged in its assignment of errors and brief filed herein, only a few of which we feel called upon to discuss.

The first assignment of error complains of the action of the court below in sustaining the demurrer to the first supplemental answer, and the proposition submitted under said assignment is as follows:

"When a parent, as next friend for the minor, institutes a suit under authority of article 3498u, Revised Civil Statutes of Texas, the status of the minor is thereby altered, and his disability to maintain the action and recover for injuries sustained is removed, and in the event such suit should be finally dismissed and abandoned, limitation will run against the cause of action therein sued upon, from the date of such dismissal, against the minor and against the parent as his next friend."

We can not assent to the soundness of this proposition. The bringing

of a suit by a person who sues under article 3498u of the Revised Statutes, as next friend for a minor, in no way changes the status of the minor. The disabilities of a minor are not removed nor suspended by the bringing of such suit, as the minor is not under said statute relieved of any of his disabilities and can himself assert no right in the institution, conduct, or disposition of such suit. The statute does say that a minor who has no legal guardian may bring suit in any court in this State by his next friend, but notwithstanding this language the right to act in bringing the suit is conferred on the next friend, and not on the minor, and the effect and intention of the statute is that the next friend of any minor, having a sufficient cause of action and who has no legal guardian, may bring suit in any court of this State for the use and benefit of such minor. If it be conceded that the institution of a suit by a next friend to recover property or damages for a minor and the subsequent dismissal of such suit by the next friend places such minor in the same status as to the running of the statute of limitation against the claim set up in said suit as when a legal guardian of such minor has been appointed and fails to sue upon claims due the minor, we are not prepared to say that the statute of limitation would run against such minor. The case of Rindge v. Oliphant, 62 Texas, 683, relied on by plaintiff in error to support the proposition that if the bar of limitation against a claim of the ward or heir has become complete as against the guardian or administrator, the ward or heir is also barred, is in direct conflict with other opinions of our Supreme Court, and so far as we have been able to ascertain, is not supported by any authority in this State. In the case of Collins v. McCarty, 68 Texas, 150, the court says: "In some States, however, it is held that the suit of an heir or ward will not be barred, though the administrator or guardian could not maintain the action by reason of the lapse of time. In others these parties are placed on a footing with trustees appointed by deed, and their failure to sue in proper time bars the right of action in those whose property they are managing, though these be under disability. In reference to this it is sufficient to say that in our State it is held that the heir or ward under disability is not deprived of his action by any neglect on the part of the administrator or guardian to bring the suit within due time." The same doctrine is announced in the case of Lacy v. Williams, 8 Texas, 182; Hanks v. Crosby, 64 Texas, 483, and McAdams v. McAdams, 10 Texas Civ. App., 654; and the case of Thomas v. Greer, 6 Texas, 372, cited by the court in the case of Rindge v. Oliphant, does not support the rule announced in that case. While an examination of these authorities will show that in neither the case of Collins v. McCarty, Hanks v. Crosby, nor McAdams v. McAdams was the decision of this question necessary to the decision of the case, all of these cases were decided after the case of Rindge v. Oliphant, and announce a contrary rule to that announced in said case. The case of Lacy v. Williams decides the exact question, and is followed by the old Court of Appeals in the case of Grant v. Anderson, 1 White & W. Con. Cas., sec. 191. Thus

it is seen that the apparent weight of authority in this State is against the rule as announced in Rindge v. Oliphant. But it is unnecessary for us to decide this question, as the bringing of the suit by George Washington as the next friend of his minor son did not create the relation of guardian and ward between them. George Washington was under no bond for the faithful discharge of his duties in the protection of the estate of said minor, and in the absence of such security the main ground upon which the rule announced in the case of Rindge v. Oliphant is based is wanting.

The third assignment predicates error upon the following statements of plaintiff's attorney, R. M. Brown, made in his address to the jury: "Gentlemen of the jury, the witness, William Underwood, was in the employ of the defendant railway company at the time of giving his deposition." Upon being interrupted by counsel for defendant and told that there was no evidence to this effect before the jury, Mr. Brown replied: "The evidence shows that he was in the employ of the Houston & Texas Central Railroad Company, and you know what the Southern Pacific is." William Underwood was a material witness for the defendant, and if he was an employe of the defendant it was permissible for the plaintiff to show that fact as tending to show that he was not a disinterested witness. And in the exact proportion that this fact was material to the plaintiff, it was material to the defendant that it should not be stated as a fact to the jury unless it was shown by the evidence in the case. There was no evidence in the case authorizing the statement that either the defendant railway or the Houston & Texas Central Railway Company was a part of or belonged to the Southern Pacific Company, and not a particle of testimony to show that Underwood was employed by the defendant, and the statements of the attorney were improper and should not have been allowed by the court. We are not prepared to say, however, that we would reverse the case because of these remarks, because they were made in the opening speech for plaintiff, and counsel for the defendant had ample opportunity to show the jury that the statements made by Mr. Brown were not sustained by the evidence. It is not shown that said improper and unauthorized remarks had any effect upon the jury, and the verdict of the jury not being apparently against the preponderance of the evidence, we can not presume that defendant was injured by said improper remarks. Railway v. Irvine, 64 Texas, 535; Willis v. Lowney, 66 Texas, 542.

We think the fourth assignment of error is without merit. While plaintiff's plea of minority only mentions defendant's plea of limitation of two years, it sets up facts sufficient to meet the plea of one year, and is clearly intended to be responsive to both pleas of limitation set up by the defendant, and as defendant's plea of the one and two years statute was contained in one plea, we think plaintiff's plea of minority was sufficient.

On the trial of the case in the court below plaintiff introduced in evidence, over the objection of the defendant, certain articles and sec-

tions of a printed pamphlet purporting to be the printed charter and ordinances of the city of Houston. The defendant objected to the introduction of said evidence "for the reasons that the printed pamphlet was not a certified copy, and did not purport to be a certified copy, of any ordinance of the city of Houston, and contained and was accompanied by no certificate or other means of indicating that the pamphlet was what it purported to be, or that the articles offered were in fact ordinances, or that there existed any such ordinances as it was thus proposed to show existed in the city of Houston, and for the reason that there was no evidence of authenticity offered in connection with or to support such pamphlet or the said articles, and that there was no evidence of authenticity with reference to the alleged charter or said sections thereof, nor any proof before the court to indicate that the said alleged charter or sections thereof constituted the charter or any portion of the charter of the city of Houston." The question raised by these objections in regard to the ordinances of the city of Houston is a difficult one, and so far as we have ascertained, has not been decided by any of the courts of this State. The charter of the city of Houston is a public act of the Legislature of which the courts will take judicial notice, so made by the act of the Legislature creating said charter. Spec. Acts 23d Leg., enacting the charter of city of Houston, sec. 63.

The act of the Legislature enacting the charter of the city of Houston contains the following provisions: "Section 36. * * * And it shall be the duty of the city council, within six months after the passage of this charter, to have compiled, printed, and published in book form, convenient of access by all citizens, all the ordinances of the city which may at the time be in force, and all such ordinances not so published shall thereafter become void. Section 53. And in all judicial proceedings it shall be sufficient to plead any ordinance of the city by caption, without embodying the entire ordinance in the pleadings, and all printed ordinances or codes of ordinances shall be admitted in evidence in any suit, and shall have the same force and effect as the original ordinance."

We think it clear that the Legislature intended by this provision of the charter to change the common law rule as to the manner of pleading and proving the ordinances of the city of Houston. It is true that the language of the provision is not as definite as it should be, and does not state that the printed ordinance shall be admitted in evidence without further proof, but we think that such is the proper construction of the provision.

If the Legislature only intended that the printed ordinances should be admitted in evidence when proven under the common law rule as to the proving of ordinances of a city, then the provision above quoted is vain and useless, and relieved the party seeking to establish any of said ordinances of no burden at all. If it is necessary to prove the printed ordinances in the same manner as the original, it was entirely unnecessary to provide that the printed ordinances should be admitted in evidence.

We think the rule laid down by Mr. Dillon, that "where the charter provides that ordinances published by authority of the corporation shall be received in evidence without further proof, a book of ordinances purporting to be thus published is competent, without further authentication; but it is not of course conclusive," applies to the ordinances offered in evidence in this case. The pamphlet offered in evidence in this case has the following indorsements printed on the first page: "The Charter of the City of Houston, together with the Revised Code of Ordinances. Compiled, printed and published by order of the City Council in compliance with the requirements of section 37 of the City Charter, and approved by said City Council by resolution adopted January —, 1894."

The book or pamphlet contains 339 printed pages, the first fifty-four pages containing a copy of the city charter, and the remaining pages are filled with what purports to be the revised code of ordinances of the city of Houston. We think this pamphlet clearly purports to have been published by authority of the corporation, and under the rule above laid down was admissible in evidence, and the court below did not err in so holding. Dillon on Mun. Corp., 4 ed., sec. 334; Lindsay v. Chicago, 115 Ill., 120; Napman v. People, 19 Mich., 352; St. Louis v. Foster, 52 Mo., 513.

It was shown upon the trial of the case that the minor, James Washington, had made and signed a written statement of the circumstances under which he was injured, and had also testified by deposition taken by the defendant while the suit in Harris County was pending, that the accident occurred in the manner set out in said written statement, which is as follows: "On the day I was injured I was coming home from church and walking up the railroad track, when I heard a train coming from Chaney Junction toward the Fifth ward depot. I stepped off the track and stood beside the passing train. Just as the last box car was passing me, I stepped close to the train, and as I did so my foot struck against something in the street and I fell, and my feet went under the box car and it cut both my feet off."

Upon the issue raised by this testimony the defendant requested the court below to instruct the jury as follows: "You are instructed that if you find from the evidence that the plaintiff was near the track of the defendant company waiting for its train to pass, and that while said train was passing by plaintiff stumbled or fell, so that his feet were run over and mashed by one or more cars of said train, then you will return your verdict in favor of the defendant."

We think the requested instruction should have been given, and the trial court erred in refusing same. The issue of unavoidable accident was clearly raised by this evidence, and such issue was not submitted to the jury by the court in his main charge. The defendant was not required to specially plead that the injury was the result of an unavoidable accident to entitle it to have such issue submitted to the jury. The

evidence was not only admissible for the purpose of contradicting the witness James Washington, but as a substantial defense under the general issue, and if believed by the jury it would have been a complete defense to this suit. Altgeld v. Emilienburg, 64 Texas, 150; Willis v. Hudson, 63 Texas, 681; Winn v. Gilmer, 81 Texas, 346.

We do not think the plaintiff in error can be heard to complain of the order of the court below directing that one-half of the judgment herein, when collected, shall be turned over by the officer of the court who should receive same to Baldwin & Meek. The judgment against plaintiff in error is in favor of the plaintiff in the suit below, and it was no concern of the defendant what might become of the proceeds of said judgment after same had been collected.

We will not discuss the remaining assignments of error further than to say that none of them, in our opinion, point out any reversible error, or any error that is likely to occur upon another trial of this cause. Because of the error of the trial court in refusing to give the requested charge above discussed, the judgment of the court below will be reversed and the cause remanded, and it is so ordered.

Reversed and remanded.

CHARLES WERNER v. TRAUTWEIN & WOLTERS.

Decided February 7, 1901.

1.—Master and Servant—Injury to Servant—Authority of Fellow-Servant.

The master is not liable for injuries to a servant while engaged in work not in the course of his employment, and which he has undertaken at the call for assistance of a fellow-servant, unless the act of the latter in calling for such assistance was authorized by the master.

2.—Same—Volunteer—Minor—Dangerous Machinery.

Where a boy of 16 years was employed to do certain work near a sotton gin, which work was not dangerous in character, and at a time when he was unoccupied a fellow servant, without the knowledge of the master or authority to do so, called the boy, without warning him of the danger, to assist in cleaning a gin stand then in operation, a service not belonging to the work assigned to the boy, who was injured by the saws of the gin, the master was not liable therefor, although then in actual control and only a few feet distant from the other parties at the time.

Appeal from DeWitt. Tried below before Hon. James C. Wilson.

Kleburg, Grimes & Baker, L. C. Grothaus, and *Geo. C. Altgelt,* for appellant.

Patton & Ellis and *A. B. Davidson,* for appellees.

GILL, ASSOCIATE JUSTICE.—This action was brought by the appellant Charles Werner against the partnership of Trautwein & Wolters, appellees, to recover damages for personal injuries inflicted upon his minor

son, Hans Werner, in a cotton gin owned and operated by appellees. A trial by jury resulted in a verdict and judgment for appellees.

Plaintiff alleges that on or about August 22, 1898, defendants, by parol contract with plaintiff, engaged plaintiff's minor son, Hans Werner, to count, mark, weigh, assort, and separate the bales of cotton ginned at defendants' round bale press. That it was understood between plaintiff and defendants that Hans Werner was at no time and under no circumstances to be employed to work at or about gin stands or other dangerous machinery, said Hans being inexperienced and without training and being a minor. That on or about October 14, 1898, defendants, in violation of said contract, and fully cognizant of the minority and inexperience of said Hans Werner, without the consent of the plaintiff, and without the knowledge of plaintiff, by and through E. Gabitsch, a duly authorized agent of defendant, who was acting within the scope of his apparent authority, ordered and directed the said Hans Werner to clean a gin stand and feed box in defendants' gin. That said order was given by said Gabitsch while he was acting within the apparent scope of his authority, and was given to said Hans in the presence and hearing of E. Wolters, one of the defendants, and was given while the machinery was in full operation. That Hans complied with said direction and order, and in the presence of said Wolters proceeded to do the labor directed. That said labor was performed in the presence and under the direction of said Wolters, and of his said agent Gabitsch, and was exceedingly dangerous, and that said Hans did not know its dangers, and that he was not warned as to such dangers by said Wolters or anyone else. That said Wolters knew said Hans was inexperienced, but gave him no caution, nor did he or his agent direct him, said Werner, how to perform said work without injury. That while so acting under such direction and control of defendants, and performing the labor requested of him, the left hand and arm of said Hans was caught in the gin-saws and so crushed, cut, and wounded as that it had to be amputated. That plaintiff had the services of skillful physicians, but amputation was necessary. That such injuries were occasioned by the act of defendants and their agents, in putting said Hans to perform such dangerous work, contrary to said contract, and without giving him any warning or caution as to the dangers attending same and directing him how to avoid such dangers.

Defendants answered by general denial, plea of contributory negligence, and averred that Hans Werner was at the time of the accident a mere volunteer, and was not directed to do the work by any one authorized to do so.

The firm of Trautwein & Wolters was composed of William Trautwein, Louis Trautwein, and Edwin Wolters, and they were engaged in operating a cotton gin and cotton presses, or baling apparatus, in connection therewith. All the cotton gins were in the same building and on the same floor, but those connected with the round bale presses were on

the opposite side of the room from those connected with the square bale presses. On the occasion in question one Gabitsch was in charge of the four-square bale gins, and it was his duty to attend to them, keep them in running order and proper repair, and to prevent injury to them, and in doing these things to use his own judgment and discretion, but it was not shown that he was authorized to hire assistance, or to call anyone to his assistance, and he had never done so prior to the time in question. On the 22d day of August, 1898, Hans Werner was hired by the firm to mark, weigh, count, assort, and separate the bales of cotton ginnned and pressed at the round bale press of defendants. The contract of hire was made with appellant, the father of the minor, the latter being at that time about 16 years old. There was evidence tending to show that by the contract of hire defendants agreed not to put Hans to work about dangerous machinery, and that appellant told Wolters, the partner who made the contract of employment, that Hans knew nothing about gins, but would soon learn; but upon this point the evidence was conflicting.

In pursuance of the contract of hire, Wolters, who was in charge and had actual control and management of the ginning plant and gave it his daily personal superintendence, placed Hans at work at the round bale press to mark, weigh, count, assort, and separate the bales coming from the last named press. He worked in this way about two months prior to the accident, and during that period was never at any time directed by Wolters or any other person to do any other kind of work. At times when there was no work of that kind to do, he and other employes about the plant were in the habit of strolling over the building. On the occasion in question he was not on duty, and was standing or walking along the space between the round bale gin stands and the square bale gin stands. His master, Wolters, who was giving the business his personal attention, came up stairs on the floor where Hans was, and near to him, when one of the square bale gins became "choked," and Gabitsch, who was in charge of it, called to him to assist him in cleaning it. This was a very dangerous task for one who did not understand the proper way to do it. He promptly responded to the call, and he and Gabitsch undertook to clean it. In doing so Hans got his hand caught in the gin saws, and it was so injured as to necessitate amputation.

It was shown beyond dispute that Wolters was in a few feet of Gabitsch and of Hans when Gabitsch called, but Wolters was not looking at Hans or Gabitsch, and he says he did not hear the call nor see Hans go to the assistance of Gabitsch. He admits, however, that when he was about nine feet distant he heard the gin "jumping," and looking around saw Gabitsch and Hans sitting down cleaning the gin, and that in a moment Hans screamed, and he assisted Gabitsch in carrying Hans to the platform. He accounts for his failure to hear the call by the noise of the machinery, which was at that time in full motion, and he is not disputed upon this point.

The evidence is conflicting as to whether Hans had been theretofore warned of the danger attendant upon the operation of gin stands, but it was not disputed that at the time of the accident no warning was given him, nor explanation made as to how the work might be safely done. Gabitsch had never been told whether he could or not call other employes to his assistance, but was not authorized to do so and had never undertaken to do so before. It was shown without dispute that the gin stand could have been easily stopped before undertaking to clean it, and that that was the safe and proper way to do it. It was also shown without contradiction that it was necessary to clean the gin stand at once to prevent serious injury to the machinery. Both Gabitsch and Hans knew of the proximity of Wolters, but neithr called to him or said anything to him until the accident had occurred. Hans had not been directly told that he should engage in no other work but that about the round bale press, but he had been assigned no other task, and had no reason to believe that he would be required to do any other work. He testified that when Gabitsch called him he thought Gabitsch was authorized to do so, and believed it was his duty to respond. It was also shown that all the hands about the plant received the same wages, viz., $1.50 per day. That they were all in the same grade of employment, and that Wolters was personally present and was exercising personal supervision and control.

Appellant urges many assignments of error, some of which should be sustained, and if there is any evidence which, in the absence of opposing proof, would authorize a recovery, the judgment must be reversed.

Appellant bases his right of recovery upon two grounds: (1) That the minor was inexperienced; that appellees knew it and placed him at work at a dangerous task without first warning him of the danger and advising him how the task might be safely done. (2) That if Wolters did not direct him to do such work without previously warning him, then that Gabitsch put him to work at the task with actual and apparent authority to do so.

We are of opinion that the evidence shows without contradiction that Wolters did not order Hans to assist Gabitsch nor did he know of, assent to, or acquiesce in the act of Gabitsch in calling him. The right to recover must then depend upon the authority of Gabitsch to call other employes to his assistance. The evidence is uncontradicted that he was clothed with no such general power, and it is conceded that he had never before undertaken to exercise such right even in an emergency. But appellant contends that inasmuch as Gabitsch was intrusted with the operation, care, and safety of the gin stand in question, he had the implied authority to call assistance in an emergency involving the safety of the machinery in his charge, and that, as the proof shows the machinery was in jeopardy, he acted within his authority in enlisting the assistance of Hans, and the master is therefore bound by his acts. In support of this contention the case of Fox v. Railway, 17 Lawyer's Reports, Annotated, 289, is cited. In that case the conductor of a train

employed Fox to take the place of a brakeman who was temporarily and unexpectedly called away. The court held that in such an emergency, while making a trip, the right to supply the place of an absent member of his crew was within his general powers as a conductor in charge of a train and charged with its safe operation. But the court did not go to the length of holding that even an agent with such general powers as a conductor, would have such authority if the master was present and in control, nor have we been cited to any authority so holding. Section 481, Mechem on Agency, cited by appellant, treats of the duty of the agent as between himself and his principal, and lays down the rule that an agent, charged with the performance of a duty in a particular way may in an emergency which precludes consultation with his principal, depart from his instructions, and if he does so in good faith and in the exercise of sound discretion, he incurs no liability to his principal for violating instructions. The rule announced does not cover the question here presented.

In Railway v. Skinner, 4 Texas Civil Appeals, 661, a minor employed by the company as a telegraph messenger boy was sent for the mail. In going to the postoffice he rode upon cars which were being switched in that direction. The foreman of the switch crew directed him to uncouple two cars, and in doing so he was injured. He was held in thus engaging in work other than that which he was employed to do to be a mere volunteer and not entitled to recover. The case was distinguished from Railway v. Eason, 65 Texas, 577, where it was held that one assisting at the request of the agent of the railway, but who was at the same time furthering his own private business, could recover for injuries resulting from the negligence of the servants of the railway company.

In Mayton v. Railway, 63 Texas, 77, the rule is recognized that in order to recover in a case of this nature the facts must show that the act of the servant in calling assistance was the act of the master. Appellant seeks to recover in this case on that theory alone. There is no allegation that the master was negligent in permitting an inexperienced minor to wander about in proximity to dangerous machinery, nor is a recovery sought upon that ground. The case of White v. Waterworks Company, 9 Texas Civil Appeals, 473, and kindred cases cited by appellant, have no application here.

Conceding that appellees contracted with appellant that they would not put the minor to work about dangerous machinery, but would assign him to work at the round bale press, the undisputed facts show that appellees assigned him to the work agreed upon, and he had performed the duties assigned him for two months without being once called to work elswhere. It has been seen that Gabitsch was a servant charged with particular duties, just as Hans was, and was without control over other servants. With no power to employ assistance, no single fact is shown which would have authorized Hans to believe that Gabitsch was clothed with such power. On the other hand, he had never seen such authority exercised by any employe, and he knew that all the work was

being conducted under the personal supervision of the master. The fact that he had responded to the call of Gabitsch was not brought to the attention of Wolters until the instant before his injury, and it is not contended that there was then time to prevent the injury by a warning from the master.

Some evidence was adduced as to the failure of the master to publish rules for the safe operation of the plant, but such failure is not made one of the grounds of recovery. The minor was off duty at the time of the accident. He voluntarily assisted Gabitsch, who had no power either real or apparent to bind the master, and the minor was in no better position than a stranger in responding to the request. To hold that the master should forsee such an event would impose upon him the duty to instruct every servant in his employ, not only as to the dangers incident to their own tasks, but as to every other piece of machinery about the plant, a duty clearly not imposed by law.

We are of opinion that the facts proven do not show a cause of action as the pleadings stand, and that notwithstanding the erroneous charges complained of, the judgment should be affirmed.

Affirmed.

ON MOTION TO CORRECT FINDINGS OF FACT.

In the main opinion we found that both Gabitsch and Hans Werner knew that Wolters was near by when Hans was called to assist in cleaning the gin. We were led to so find because of the statement of Hans that Wolters was in a few feet of him at the time, and by the statement of Gabitsch that he had seen Wolters come upon that floor only a short while before. A closer examination of the entire testimony of Gabitsch leads us to conclude that there is a conflict in the evidence as to whether Gabitsch knew of the proximity of Wolters at the time he called for Hans, and we now find that the evidence is conflicting upon the point.

The change does not alter the conclusion heretofore reached by us, and we are unable to see in what respect the appellant's rights on writ of error would have been prejudiced by the inaccuracy, but for the sake of accuracy and in response to the prayer of appellant we make the correction.

Our findings are assailed in other respects, but we think they are correct, and the motion, except to the extent indicated, is overruled.

Writ of error refused.

PALESTINE COTTON SEED OIL CO. v. CORSICANA COTTON OIL CO.

Decided February 10, 1901.

1.—Contract of Sale—Breach—Delivery—Time.

Where defendant contracted to sell and deliver to plaintiff during the first half of October five car loads of cotton seed oil, in tank cars, to be furnished by plaintiff, it could not justify its breach of the contract on the ground that the cars were not furnished in time, where they reached the railroad station at defendant's mill three days in advance of the expiration of the contract time, and could have been loaded in time, but for defendant's side track to its mill being crowded with seed cars, a condition for which it was primarily responsible. See evidence held to show a substantial compliance on the part of plaintiff as to furnishing cars in time.

2.—Same—Evidence.

Evidence that it would take defendant six hours to load a tank car with oil was properly excluded, it not being shown that plaintiff had any knowledge of the defendant's facilities for loading.

3.—Same—Measure of Damages—Difference Between Contract Price and Market Price.

The measure of plaintiff's damages was the difference between the contract price and the market price of the oil at the place of delivery on the last day it should have been delivered; and it did not change the rule that the buyer had by contract resold the oil and had filed that contract with other oil bought at less than such market price, where he would, but for such breach of contract, have also sold such other oil at the same higher market price.

Error from Anderson. Tried below before Hon. A. B. Lipscomb.

B. H. Gardner and *Gregg & Brooks,* for appellant.

Thomas B. Greenwood, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—This action was brought by defendant in error against plaintiff in error to recover damages for the breach of a contract of sale of 30,000 gallons of cotton seed oil. The trial of the case by a jury in the court below resulted in a verdict and judgment in favor of defendant in error for the sum of $2100, from which judgment this writ of error is prosecuted. The following are the facts as disclosed by the record.

On the 14th of September, 1899, defendant in error agreed to purchase of the agent of plaintiff in error five tanks of cotton seed oil at 18 cents per gallon, f. o. b. cars at Palestine, the terms of said contract of sale being set out in the following letter written on said date by defendant in errror to plaintiff in error: "We confirm purchase of you through John Hamilton of five buyer tanks prime crude cotton seed oil at 18 cents per gallon f. o. b. our tanks Palestine, for shipment first half of October. Tanks to hold 130 barrels each, 10 per cent more or less."

On September 23d defendant in error wrote plaintiff in error as follows: "If you can let us send you one or two tanks very early in October, please advise us in time, so that we can get tanks to you in time to move the five tanks bought of you for first half of October shipment."

Plaintiff in error replied to this letter on September 25th, stating that one tank could be sent at once, two more the last of the week, and the last two in about a week from September 25th.

On October 3d defendant in error wrote plaintiff in error as follows: "We beg to advise we have resold the oil bought of you recently to Swift & Company at 22 cents per gallon, first half of October shipment." On same day defendant in error wrote to their broker: "We confirm sale through you to Swift & Company of 625 barrels prime crude oil at 22 cents per gallon, f. o. b. buyer's tanks Palestine, Texas, first half October shipment. We bought this oil from Palestine mill at a low price, and it is absolutely necessary that tanks reach Palestine in time to load first half of October, or else they will get out of trade."

Swift & Company wrote plaintiff in error on October 4th: "We confirm purchase from you of 625 barrels prime crude cotton seed oil at 22 cents per gallon, load in our tank cars f. o. b. your mill, shipment first half October." Plaintiff in error wrote Swift & Company on October 5th as follows: "We would like to have you send the tanks at once to move the oil sold to Corsicana oil mill and then sold to you by them. Send tanks promptly. Can ship as fast as you can get tanks here." When plaintiff in error wrote this letter it knew that it would take two days for the letter to reach Chicago, and about eight days for the cars to come from Chicago to Palestine. This letter was received by Swift & Company on October 7th, and on same day they started seven tank cars from Chicago to Palestine for shipment of this oil, and on next day notified plaintiff in error that the cars had been sent, and requested that they be notified by wire if there was any delay in their transportation. These cars were shipped over the usual route and were carried to Palestine with the usual dispatch, two arriving October 12th and the others October 14th. There is a conflict in the testimony as to whether or not the plaintiff in error was notified on October 13th of the arrival of the two cars at Palestine on the 12th. The agent of the railway company at Palestine testifies that he notified the manager of plaintiff in error on the 13th of October of the arrival of said cars, and was told by him that plaintiff in error was not ready to have the cars placed on the mill siding, and would let the railway company know when they wanted the cars so placed. The manager denies that he was notified of the arrival of the cars on the 13th, but says if he had been so notified, the cars could not have been placed on the mill siding, because said siding was filled with seed cars. The siding was in this condition from the 12th to the 16th, and as the tank cars could only be filled when placed on the siding, they could not have been filled at any time between the 12th and 16th of October. On the morning of the 16th the railway company notified plaintiff in error that the cars had all arrived, and desired to know if they should be placed on the mill siding. This notice was given between 9 a. m. and 12 noon on the 16th. Upon receipt of this notice plaintiff in error informed the railway company that it would notify them if it desired the cars placed on the siding,

and then communicated with the defendant in error, the Corsicana company, and informed said company that the cars had arrived too late to be filled for shipment the first half of October. On the 20th of October plaintiff in error wrote defendant in error declining to fill the contract on the ground that defendant in error had made the performance of the contract impossible by failing to deliver the cars in time, but offering to fill the two cars which reached Palestine on the 12th. Defendant in error continued to demand the oil until the 26th of October, when it filled its contract with Swift & Company with other oil which it had bought for 20 cents a gallon. The price of oil began to advance in October, and on the 16th of the month the market price of prime crude cotton seed oil at Palestine was 25 cents per gallon. The price began to decline after the 16th, and on the 26th, when defendant in error filled its contract with Swift & Company, it was worth only 20 cents per gallon. Defendant in error, in order to be able to fill its contracts with Swift & Company, kept on hand and refused to sell five tanks of oil which it otherwise would have sold at 25 cents per gallon. There was no evidence as to how long it would ordinarily take a mill of the capacity of the Palestine mill to load five tanks of oil, nor any evidence that defendant in error had any knowledge of the facilities of the Palestine mill for loading tank cars. Plaintiff in error offered to prove by its manager, Johnson, and its president, Wright, that it would take their mill six hours to load a tank car with oil, but on objection of defendant in error this testimony was excluded on the ground that it was not shown that defendant in error had any knowledge of the facilities possessed by plaintiff in error for loading tank cars, neither was it shown or offered to be shown how long it would ordinarily take a mill of the capacity of the Palestine mill to load said cars. The evidence shows that it was the custom of the Palestine mill to load only one car at a time, and load through a two-inch pipe, but there is no evidence that defendant in error had any knowledge of these facts. Wright, the president of the Palestine company, testified: "If oil had been worth less than 18 cents on October 16th, it is very likely that the tanks would have been loaded." It is evident from the letters of defendant in error introduced in evidence that it construed the contract to require the tank cars to reach Palestine and be delivered to the plaintiff in error in time to be loaded during the first half of October. The only defenses pleaded by defendant in the lower court was the failure of the plaintiff to furnish the cars in time to make the delivery of the oil within the first half of October, and that plaintiff, having sold the oil at 22 cents per gallon and filled the contract with oil bought at 20 cents per gallon, could in no event recover more than 2 cents per gallon as damages.

We deem it unnecessary to consider the various assignments of error presented in the brief of plaintiff in error complaining of errors in the charge of the court on the issue as to whether or not the defendant breached the contract, because, under our view of the law applicable to the facts in this case, no other verdict could have been rendered than

one in favor of the plaintiff, and if the trial court committed any error in his charge in submitting said issue, such error was harmless.

Conceding that the contract required the defendant in error to furnish the cars in which said oil was to be shipped in time for them to have been loaded before 12 o'clock noon on October 16th, we think the evidence in the case shows conclusively that, if said cars were not so furnished, the failure to furnish them within said time was due to conditions for which the plaintiff in error was primarily responsible; and to permit plaintiff in error to avoid its contract because said cars were not so furnished would be to allow it to take advantage of its own wrong.

When the defendant in error notified the plaintiff in error that it had sold the oil to Swift & Company, and requested that it be delivered in accordance with the contract in cars to be furnished by Swift & Company, plaintiff in error acquiesced in the transfer of the contract to Swift & Company, and with full knowledge of the fact that it required about eight days for Swift & Company to forward the cars from Chicago, it wrote said company on October 5th requesting that the cars be forwarded at once. This letter plaintiff in error knew could not reach Chicago until the 7th of October, and the evidence is uncontradicted that the cars were started from Chicago to Palestine on that day, and on the next day Swift & Company wrote plaintiff in error that the cars had been forwarded, and requested that they be notified by wire of any delay in their transportation. All of these cars reached Palestine by the 14th of October, which was in ample time for them to have been loaded before noon of the 16th. Notwithstanding the knowledge on the part of plaintiff in error that said cars had been forwarded from Chicago and could not reach Palestine before the 13th, according to the undisputed testimony plaintiff in error had its siding so filled with seed cars during all of the time between the 12th and 16th of October that the tank cars could not have been placed on said siding and loaded during any portion of said time.

In view of these facts the statement of the president of the defendant company, that "If oil had been worth less than 18 cents on October 16th, it is very likely the tanks would have been loaded," appears to us to be a frank statement of real reason for the failure of plaintiff in error to deliver the oil in accordance with its contract.

The offer of plaintiff in error to fill the two cars which arrived on the 12th was an admission that the failure to fill said cars before noon of the 16th was due to conditions for which plaintiff in error was responsible, as it denied it had any knowledge of the arrival of said cars in Palestine before the morning of the 16th, and its manager testified that he did not expect to be notified by defendant in error of the arrival at Palestine of any of said cars. The same conditions which prevented the loading of the two cars before the end of the first half of October also prevented the loading before said time of the three cars which arrived on the 14th, and plaintiff in error was as much responsible for

said failure in regard to the cars arriving on the 14th as in regard to those which arrived on the 12th. We think the trial court did not err in excluding upon the grounds hereinbefore stated the proffered testimony as to the length of time it would take the Palestine oil mill to load a tank car with oil. Said testimony was also inadmissible because immaterial under our conclusion, as to the effect of the undisputed evidence in the case, above expressed.

If our conclusion as to the effect of the evidence as above expressed is erroneous, we are of opinion that the judgment of the court below should be affirmed because the delivery of the cars to the plaintiff in error before noon of the 16th of October was such substantial compliance by defendant in error with the terms of the contract as contended for by plaintiff in error as would in equity entitle defendant in error, under all of the facts in this case, to enforce a performance of said contract by plaintiff in error.

There is nothing in the facts of this case which would make the application of the general rule as to the measure of damages for a breach of a contract of sale inequitable. It is true defendant in error filled its contract with Swift & Company with oil worth only 20 cents per gallon, and made a profit of 2 cents per gallon on said sale, but in order to fill this contract it had to hold the oil which it would otherwise have sold for 25 cents per gallon. We think it clear that under the evidence defendant in error has been damaged in amount equal to the difference between 18 cents per gallon, the contract price of the oil, and 25 cents per gallon, the market value at Palestine, Texas, on the day plaintiff in error failed to perform its contract, and the trial court did not err in rendering judgment for defendant in error for that amount. We are of opinion that the judgment of the court below should be affirmed, and it is so ordered.

Affirmed.

ON MOTION FOR REHEARING.

At the request of plaintiff in error we find the following additional conclusions of fact, and modify the conclusions stated in our former opinion as herein indicated.

1. It is not shown when the letter written by plaintiff in error on October 5th to Swift & Company, requesting that the cars be forwarded, was received by Swift & Company. In their letter of October 8th notifying plaintiff in error that the cars had been shipped on the 7th, Swift & Company do not refer to the letter of plaintiff in error of October 5th, and the cars were not forwarded in response to the request made in said letter. When plaintiff in error wrote the letter of the 5th of October it did not know where the cars would be shipped from, as they were liable to have been forwarded from St. Louis or at any point from which they could have been obtained on the International & Great Northern Railroad.

2. Plaintiff in error did not offer to fill the two tanks, which arrived on the 12th, in its letter to defendant in error on October 20th, but such offer was made on October 16th, and was conditioned that defendant in error would not insist on the filling of the remaining tanks. The offer to fill the two tanks upon condition that the defendant would consider the contract as at an end should not be considered as an admission by plaintiff in error that it was bound under the contract to fill said two tanks, and our reasoning upon that point in our former opinion is not sound, as the facts are now found to exist.

With these modifications of our findings of fact we adhere to our former opinion, and the motion for a rehearing will be overruled.

Overruled.

International & Great Northern Railroad Company v. A. E. Jackson.

Decided February 25, 1901.

1.—Evidence—Expert Testimony—Harmless Error.

It was harmless error, if error at all, to admit the testimony of an expert witness for the purpose of showing the manner in which a coemploye should have performed his task, if he had been competent, where testimony of such witness showing the proper manner of doing the work had already been permitted by appellant to go before the jury without objection.

2.—Same—Master and Servant—Servant's Incompetency.

Upon an issue as to whether a servant's incompetency was known to the master, or by the use of ordinary care should have been known, evidence of the servant's general reputation among his fellow workmen for competency or incompetency in the work for which he was employed, was admissible, the witnesses who testified thereto qualifying themselves as experts.

3.—Master and Servant—Charge—Qualifications of Liability.

While it is probable the better practice for the charge to state the qualifications of the master's liability, such as may arise from contributory negligence and assumed risk, in immediate connection with the statement of such liability, yet a failure to do so does not necessarily operate to confuse or mislead the jury where in connection with the statement of the liability, reference is made to previous portions of the charge where such qualifications are specifically stated.

Appeal from Anderson. Tried below before Hon. A. B. Lipscomb.

N. A. Steadman, W. B. Teagarden, and *G. H. Gould,* for appellant.

Campbell & McMeans, for appellee.

PLEASANTS, Associate Justice.—This action was brought by the appellee against the appellant to recover damages for personal injuries to appellee alleged to have been caused by the negligence of appellant.

The petition alleges that on December 4, 1899, the plaintiff was in the employment of defendant in the capacity of coach carpenter in defendant's shops in the city of Palestine; that while so employed it became

necessary for him on said date, in the performance of his duty as such coach carpenter in the construction of a passenger coach in said shops, to get upon a scaffold, and while thereon to place and adjust and to aid in placing and adjusting to said coach a certain iron plate commonly known as a side vestibule plate; that said vestibule plate, in order to be properly adjusted, had to fit tightly in mortices in posts and blocks on the side of said coach; that plaintiff and one E. Cossett, who was also employed by the defendant as a coach carpenter and who was then working with plaintiff on said coach, raised said iron plate and rested its lower edge in the lower side of said mortices; that it then became necessary to put a clamp upon said plate to hold it in said mortices, and that plaintiff requested said Cossett to hold said plate in position until he could reach and secure a clamp therefor, and said Cossett answered that he would do so; that thereupon plaintiff released his hold upon said plate, turned his body slightly, stooped and picked up a clamp off the floor of the scaffold, and as he was raising said clamp Cossett negligently released his hold on said plate and negligently struck it with a hammer, causing the said plate to slip out of the mortice and to fall edgewise on plaintiff's foot, breaking the bones and ligaments thereof and otherwise bruising, wounding, and mangling the same, and thereby rendering plaintiff a cripple for life; that the said Cossett was incompetent as a coach carpenter, and was careless, unsafe, and negligent as such, and wholly unfit for the duties devolving upon him in that capacity, all of which was known to the defendant, or could have been known to it by the use of ordinary care, but was unknown to plaintiff; that the defendant was guilty of negligence in employing said Cossett and in retaining him in its service, and that plaintiff's injuries were caused by said negligence of defendant. The petition asks damages for physical and mental pain and anguish suffered by plaintiff as the result of said injuries, for loss of time and wages and for permanent impairment of capacity to earn money, the damages so claimed aggregating the sum of $20,000.

The answer of defendant contains a general denial and pleas of assumed risk and contributory negligence, and also avers that the work upon which Cossett and plaintiff were engaged at the time of the alleged accident was not such as required skill or experience in its performance, and that if plaintiff was injured as alleged, such injury was caused by the negligence of a fellow-servant for which the defendant was not liable. The trial of the cause by a jury in the court below resulted in a verdict and judgment in favor of the plaintiff for $5000, from which judgment the defendant prosecutes this appeal.

We conclude from the evidence in the record that the appellee was injured in the manner and under the circumstances alleged in his petition; that E. Cossett, by whose negligence appellee was injured, was inexperienced and incompetent as a coach carpenter, and was a careless and unsafe person and unfit for the performance of the duties required of a coach carpenter; that appellant, by the exercise of ordinary care,

could have discovered at the time it employed him the incompetency and unfitness of said Cossett for the discharge of the duties of a coach carpenter, and was informed of such incompetency and unfitness of the said Cossett prior to the injury to appellee. It was not the custom of appellant to employ incompetent and inexperienced men as coach carpenters, and appellee had no knowledge of the incompetency and unfitness of said Cossett, never having worked with him before the time of the injury.

The negligence of the appellant in employing the said Cossett without using ordinary care to ascertain whether or not he was a competent and safe person for the performance of the duties required of him, in retaining him in its employment after knowledge of his incompetency and unfitness, was the direct cause of the injury to the appellee. The injury to appellee's foot is permanent; the arch of the foot is broken down, which causes appellee to suffer severe pain whenever he uses the foot. As a result of said injury appellee's capacity to earn money has been permanently impaired, and he has been damaged in the amount found by the jury.

Appellant's first assignment of error complains of the action of the trial court in permitting the witness Johns to testify, over the objection of the defendant, that under the circumstances existing at the moment of the accident Cossett, if he had been a competent and careful man, would have held the plate while appellee picked up the clamp. The proposition urged under this assignment is that said testimony was inadmissible because the duty of a man under such circumstances was not a question of expert testimony, and the evidence was immaterial because no skill was required to perform the feat. While it may be true that it required no skill to hold the plate in position, the evidence shows that it required skill and experience to properly adjust the plate in the mortices in the side of the coach, and that a competent coach carpenter would have used a clamp for this purpose, and would not have attempted to force said plate in the mortices by striking it with a hammer without first having fastened it with the clamp. The witness Jones was an expert coach carpenter, and in explaining the proper method in which said plates should be placed in the side of a coach, he had previously stated, without any objection on the part of defendant, that one man should hold the plate in the edge of the mortice while the other put a hand screw or clamp on it. This testimony being before the jury without objection, if there was any error in admitting the testimony complained of in this assignment such error was harmless. Clarkson v. Whitaker, 12 Texas Civ. App., 483; Railway v. John, 9 Texas Civ. App., 342.

There is no merit in appellant's second and third assignments of error which complain of the action of the trial judge in permitting certain witnesses for the plaintiff to testify over the defendant's objection that the general reputation of Cossett among his fellow workmen for competency and care as a coach carpenter was bad, and that in the opinion of said witnesses Cossett was incompetent, careless, and unsafe as a

coach carpenter. These witnesses had qualified as experts, and their opinion as to Cossett's competency was admissible; and testimony as to the general reputation of said Cossett was admissible on the issue as to whether or not the appellant exercised ordinary care to discover his incompentcy. Railway v. Scott, 68 Texas, 694; Railway v. Henning, 39 S. W. Rep., 302; Railway v. White, 56 S. W. Rep., 206.

We deem it unnecessary to consider in detail the various assignments presented in appellant's brief which predicate error upon the refusal of the trial court to give to the jury various special charges requested by appellant. In so far as any of said charges contain a correct statement of the law applicable to the facts in this case, the law has been properly applied to the facts in the case in the main charge of the court, and it was not error to refuse such special charges.

Appellant's seventeenth assignment of error complains of the fifteenth paragraph of the court's charge in that it sums up facts and conditions upon which the jury were directed to find absolutely for the plaintiff, if they found such facts and circumstances to exist, thereby excluding from the jury the issues of assumed risk and contributory negligence, and in these respects said paragraph is in conflict with the next succeeding paragraph and was calculated to confuse and mislead the jury. The paragraphs of the charge referred to are as follows:

"15. Bearing in mind the foregoing instruction, if you believe from a preponderance of the evidence that the witness E. Cossett was, by reason of incompetency or recklessness, unsafe for his fellow servants to work with, and that the fact was known to the defendant, or to its foreman, charged with the duty of investigating or inquiring as to such matters, or that such fact could have been known to him by the use of ordinary diligence, and you further believe that plaintiff at the time and under the circumstances hereinbefore set out, told the said witness to hold the vestibule plate in position while plaintiff stooped for a hand screw or clamp, and that Cossett replied that he would, and that plaintiff thereupon let go his hold upon said plate and stooped for a hand screw or clamp, and that thereupon the said Cossett let go said plate and struck it with a hammer, causing it to fall and strike and injure plaintiff, and that said act was negligent on the part of said Cossett, and that plaintiff's foot would not have been injured if there had been an ordinarily competent and careful person in the place of said Cossett, and that said injury was directly traceable to the incompetency or recklessness (if any) of said Cossett, and that it was such injury as might reasonably be contemplated as a probable consequence of employing such a man as Cossett as a coach carpenter, then you will find for the plaintiff.

"16. If you believe that in the acts of the parties shown by the evidence as leading to the injury, the plaintiff was negligent, or that by the exercise of ordinary care plaintiff might have prevented injury to himself, or if you believe that plaintiff's injury resulted from an assumed risk, or that plaintiff knew of Cossett's incompetency and recklessness (if any), or knew of facts that would make same a reasonable

inference, or if you fail to find that the injury (if any) resulted from negligence on the part of Cossett, or if you fail to find that the defendant was negligent in employing the said Cossett or in retaining him in its service, then you will find for the defendant."

In previous paragraphs of the charge the issues of assumed risk and contributory negligence as raised by the pleading and evidence in the case were fully explained to the jury, and the jury were told that in no event could the plaintiff recover if the risk of such injury was assumed by him in entering or remaining in the employment of the defendant, nor if his own negligence contributed to the injury, and in the paragraph of the charge complained of the jury are reminded of the instructions therefore given them and the instructions given in said paragraph are expressly qualified by said preceding instructions.

While it is probably the better practice to state the qualification of the liability in connection with the statement of the liability, we can not hold that the failure to do so, where such qualifications are referred to in connection with the statement of the liability, was calculated to confuse or mislead the jury. Taking the charge as a whole we think it could not have been misunderstood by the jury.

We think none of the objections urged by appellant to the charge of the court are valid, and deem it unnecessary to discuss any of the remaining assignments of error. Finding no error in the record, the judgment of the court below must be affirmed, and it is so ordered.

Affirmed.

INDEX.

Abandonment. See Contract, 3; Homestead, 5, 12; State School Land, 22.

Abatement. See Plea in Abatement.

Abstract. See Evidence, 16.

Acceptance. See Contract of Sale, 4; Dedication, 1.

Account.

A physician's bill for professional services is not such an account as can be proved by affidavit under Revised Statutes, article 2323, providing that a verified open account shall be prima facie evidence of the debt. Garwood v. Schlichenmaier, 176.

Acknowledgment. See Deed, 1; Married Woman, 2.

Act of God. See Landlord and Tenant, 5.

Action for Death.

1. A married daughter, being within the class named by the statute, is entitled to recover damages for the death of her father, although he was not then bound to contribute to her support. Railway v. Martin, 204.
2. Although the sums given by the deceased to his daughter were gratuitous contributions, in irregular amounts and at irregular intervals, it was for the jury to decide from the evidence what amount she might reasonably have expected to receive from him. Id.
3. Evidence that deceased was killed "in Sherman" is sufficient to establish that the death occurred within the corporate limits of that city. Id.
4. See the opinion for evidence held sufficient to show that deceased who, while walking along a railroad side track, was run over by a train, was not guilty of contributory negligence, and also to show that the operatives of the train were guilty of negligence in failing to stop it. Id.

Action for Personal Injury.

See the opinion for evidence in an action for personal injuries to a boy by a moving train held to raise the issue of unavoidable accident and to require its submission to the jury upon defendant's request. Railway v. Washington, 600.

Admission. See Pleadings, 6.

Adoption. See Will, 2.

Affidavit. See Account; Archive.

Agency. See Fire Insurance, 1, 2, 3, 10.

1. A bond for title signed without indicating that it was done as agent, but stating in the body of the instrument that the maker acted for himself and as

Agency—continued.

agent for another, shows such execution by the other through an agent as to constitute a good conveyance if ratified by the principal. Marlin v. Kosmoroski, 335.

2. Where the execution of a conveyance by agent has been found, on sufficient evidence, to have been ratified by the principal, errors in the charge or in the rulings on evidence upon the issue of the agent's original authority are not ground for reversal. Id.

3. As tending to proof that C. was defendant's agent in the matters in controversy, it was permissible for plaintiff to show that the affidavit to defendant's pleas in the case were signed and sworn to by C. as his agent. Parlin v. Miller, 190.

Allegation and Proof. See Variance.

Where plaintiff's claim of title to the property in controversy was by virtue of a judgment and execution sale thereunder, and his petition alleged that the judgment was rendered in the district court, but the judgment introduced in evidence was rendered in the county court, an objection on the ground of variance came too late after verdict. Jones v. Drug Co., 234.

Amendment. See Costs; Continuance; Harmless Error, 1; Jurisdiction, 8; Pleading, 3.

1. Where plaintiff, a railroad switchman, alleged that his injuries were occasioned through the negligence of R., an incompetent employe, and that he had complained of R. to one O., a vice-principal of defendant company, his second amended petition alleging that the complaint was made to O. and also to M., yard foreman and vice-principal, this did not set up a new cause of action within the rule as to limitations. Railway v. Eckles, 176.

2. Where only the original petition, and second amended petition containing the new allegation, are before the appellate court, and there is nothing in the record to show the date and contents of the first amended petition, the presumption obtains in favor of the ruling of the trial court that the first amendment was filed in time and also contained the new allegation. Id.

Appeal. See Forcible Entry and Detainer; Mandamus.

1. A vendor's lien note for land was executed by D., and subsequently Y., having purchased the land, assumed its payment as part of the consideration. The holder of the note sued both D. and Y. and obtained judgment against D. for the amount of the note, and against both for foreclosure of the lien, from which judgment Y. alone appealed by writ of error against the plaintiff, and without making D. a party thereto. Held, that the writ of error must be dismissed, as D. was a necessary party thereto, his interest being adverse to that of Y., in that if the latter should defeat the lien, as he sought to do, D. must pay the entire money judgment. Yarnell v. Burnett, 26.

2. Where, in an action for land brought by several plaintiffs among whom there is no conflict of interest, some of the plaintiffs recover a part of the land, and defendant has judgment against the others, and these alone appeal, cross-assignments by defendant against the plaintiffs who recovered, defendant not having perfected a cross-appeal, will not be considered. Hoover v. Kearbey, 71.

3. Where plaintiff sued in justice court and defendant pleaded that a suit was then pending in the district court between the same parties which involved the same subject matter, and the plea having been sustained, plaintiff appealed to the county court, and after such appeal the suit in the district court was dismissed, it was error for the county court to sustain the same plea when there interposed by defendant, since the appeal had the effect to dissolve the justice's judgment, and the case was to be tried in the county court de novo upon the law and facts as then existing and applicable. Lackey v. Campbell, 512.

Appeal Bond.

1. Where an appeal bond from the justice to the county court, under Revised Statutes, article 1670, was conditioned that if the judgment of the latter court

Appeal Bond—continued.

was against appellant, she would "perform its judgment, sentence, or decree," this was sufficient, being equivalent in legal effect to the statutory provision that the appellant shall "pay off and satisfy the judgment that may be rendered against him on such appeal." Coman v. Lincoln, 276.

2. If the obligation in such bond to "pay all such damages as said court may award against her" rendered the condition of the bond more onerous than required by law, such additional obligation may be treated as surplusage, and will not vitiate the bond. Id.

Appeal from County Court. See Jurisdiction, 6.

Archive.

An affidavit filed in the Land Office explanatory of field notes is not an archive of that office so as to make it admissible in evidence, and the fact that the affiant was the surveyor who did the work and was dead when the affidavit was offered does not alter the case. Barrow v. Gridley, 13.

Argument of Counsel. See Remarks of Counsel.

1. Where, in a railroad grass-burning case, counsel for plaintiff, in his argument to the jury, stated that the depositions in the case of defendant company's engineers and boiler inspector as to the inspection and condition of the engines were the same, and almost verbatim copies, of the first deposition that was ever used in a grass-burning case, and that these engineers are always engineers of fifteen to twenty years experience, etc., such remarks were prejudicial error, requiring a reversal of the judgment. Railway v. Burton, 63.

2. Remarks of counsel to the jury asserting facts of which there is no evidence in the case are improper, but will not necessitate a reversal where it is not shown that they had any effect on the jury, and the verdict is not against the preponderance of the evidence. Railway v. Washington, 600.

Assignment of Error. See Practice on Appeal, 4, 5.

1. Where the record does not show any assignments of error filed, none will be considered, although appellant's brief purports to set forth assignments taken apparently from the motion for new trial. Hoover v. Kearbey, 71.

2. An assignment of error to the action of the trial court in refusing appellant's request to find a certain conclusion of law is not well taken, since, if the conclusions of law are erroneous, they may be revised in the appellate court on proper assignments. Lovejoy v. Townsend, 385.

3. An assignment of error to the sufficiency of the evidence to support the verdict may be denied consideration on account of the too general statement in the motion for new trial, that the finding complained of "was contrary to the evidence and unsupported by the evidence." Moody v. Hahn, 474.

4. An assignment of error to the court's refusal of a charge that was erroneous does not raise the question of error in its failure to submit that issue in some form. Parlin v. Miller, 190.

5. When the record contains no cross-assignment of error by appellee and his brief presenting it is not shown by the clerk's certificate to have been filed in the trial court, it will not be considered. Scott v. City of Marlin, 353.

Assumed Risk. See Fellow-Servant, 1, 2; Master and Servant, 1-5.

Attorney Fee. See Married Woman, 4.

Authentication. See Evidence, 14.

Banks. See Garnishment, 1.

Bankruptcy. See Pleading, 6.

Benefit Insurance. See Life Insurance, 1; Mutual Benefit Insurance.

Bona Fide Purchaser. See Innocent Purchaser.

Books of Account. See Evidence, 23.

Boundaries. See Limitations, 2.

The purchasers of city property bounded by streets were concluded by the previous acts of their vendor in exchanging with the city a strip upon one side of the block for a similar strip of the street on the opposite side, widening one street and narrowing the other, where they bought with knowledge and after the new boundaries had been marked by inclosures. Scott v. City of Marlin, 352.

Bonds. See Appeal Bond; County Bonds.

Where a bond for the hire of county convicts, duly executed to the county judge, was signed by appellant as surety on condition that he was not to become liable thereon unless it should be also signed by one K. as surety, and the county judge, knowing of such condition, accepted the bond without K.'s signature, appellant was not liable, the condition upon which he signed never having been fulfilled. Gatlins v. County, 283.

Briefs. See Assignment of Error, 5.

Broker. See Principal and Agent, 1.

Burden of Proof. See Marriage, 2; Negligence, 1.

Carriers. See Carriers of Passengers; Interstate Shipment; Railway Company.

1. See evidence held to support a verdict in the amount of $518.55 for damages in transportation of 128 head of cattle, by delay, rough handling, insufficient food and water, and muddy pens. Railway v. Porter, 491.
2. A carrier can not avoid liability for failure to transport cattle within a reasonable time by showing that its regular trains did not connect in time to avoid the delay. Id.
3. An allegation in a suit against a carrier for damages to live stock in their transportation, that they were delivered in a damaged condition through defendant's negligence and delay in transporting them, was sufficient to admit evidence as to failure to properly feed and water them; and such evidence was also admissible on the issue made by defendant, that their injury was due to their wild and restless nature, as showing the cause of their restlessness to be the fault of defendant. Id.
4. Where there is an interstate shipment of goods from another State to a point in Texas over several connecting lines of railway, with a stipulation in the contract of shipment limiting the liability of the carriers to damages occurring on their respective lines, and the goods are lost before they come into this State and before reaching the last connecting carrier, the latter is not liable therefor; and article 331a of the Revised Statutes (the connecting carriers' act of 1895), fixing the liability of connecting carriers for a through shipment of goods between points in this State, has no application. Goldstein v. Railway, 365.

Carrier of Passengers. See Railway Company, 12, 13, 14.

1. Where a railway company sells to a passenger a through ticket over its own and connecting lines, stipulating that it acts only as agent for the other lines, its contract of carriage is complete when it has safely transported the passenger and delivered him at its depot at the point of connection with the next line, and it can not, after a reasonable time has been allowed the passenger for departing from the depot, be held liable on its contract of carriage for any act occurring thereafter. Davis v. Railway, 8.

Carriers of Passengers—continued.

2. Where a railway company's contract of carriage with a passenger, holding a through ticket over connecting roads, has ceased by virtue of his delivery at its depot, it is liable for the mistake of its agent there in directing the passenger to a wrong train for the continuance of his journey only in the event of want of ordinary care on the part of the agent. Id.

3. A requested charge making the act of the carrier's agent, in giving the passenger erroneous information as to which train he should take next, negligence per se, is properly refused, since it is for the jury to determine whether or not such act was negligence. Id.

Change of Venue.

Unless the action of the trial court in refusing an application for change of venue is clearly shown to be erroneous, it will not be revised on appeal, the credibility of the person making the application, their means of knowledge and the truth of the facts set forth therein, having been duly attacked, and the issue so formed tried by the court as the statute directs. Rev. Stats., art. 1272. Railway v. Crowder, 536.

Charge of Court. See Contract of Sale, 4, 5; Master and Servant, 1, 2, 8; Negligence, 3; Railway Company, 9, 10, 11.

1. A charge to the effect that a party's failure to produce his books of account in obedience to a subpoena duces tecum must be accepted as proof that, if produced, they would be adverse to his interest, is unwarranted and on the weight of evidence where there is testimony in the case tending to show a reasonable excuse for such failure. Parlin v. Miller, 190.

2. Where a clause of the court's charge instructed the jury that if they should find that the action of defendant's servants in charge of a train causing it to back on the crossing was negligent under the circumstances, and that but for such negligence plaintiff would not have been injured, then they should find for plaintiff, unless they should find for defendant "under the instruction hereinafter given," this was not misleading as tending to induce the jury to understand that they could return a verdict for plaintiff independent of what followed in the other paragraphs. Railway v. Stonecypher, 569.

3. The court properly refused a charge to the effect that plaintiff could not recover by reason of his team becoming frightened unless the act of defendant's servants which caused the team to become frightened were wantonly and willfully done. Id.

4. It was a question for the jury whether or not the defendant's brakeman signaled plaintiff to cross the track; and if he intended to signal for the engineer only, it was still a question of fact as to whether the operators of the train acted with ordinary care, and whether plaintiff was guilty of contributory negligence under the circumstances. See opinion for charge held sufficient on this phase of the case. Id.

5. A requested charge should be read in connection with the instructions given by the court, and need not embrace matters fully covered therein. Railway v. Ford, 328.

6. When there is no doubt that conduct of the injured party, such as walking in front of or against a moving car, was a cause of the injury, a charge may declare such conduct, if negligent, to constitute a defense, without submitting the question of its causal connection. Id.

7. Special charges requested are properly refused where the same ground is sufficiently covered by the charge of the court. Standlee v. Railway, 340.

8. The court may instruct the jury that the injured party was a trespasser where the evidence indisputably establishes that fact. Id.

9. A charge instructing that for defendant railway company to permit dry and inflammable matter to accumulate and remain upon its right of way would be such negligence upon its part as would make it liable for any damage occasioned by fires through such negligence, was error as being on the weight of evidence. Id.

10. It was not error, nor on the weight of evidence, for the court to charge that, if the fire was caused by sparks from an engine, such fact would prima

Charge of Court—continued.

facie establish negligence on the part of the railway company; but a further clause instructing that, in order to rebut such prima facie case, the defendant company must show to the satisfaction of the jury that the engines were in good condition, was erroneous, as requiring a higher degree of certainty than the law requires. Id.

Chattel Mortgage.

A duly recorded chattel mortgage upon all live stock owned by the maker is superior to a chattel mortgage subsequently given by him upon two certain mules that he owned at the date of the first mortgage. Watson v. Boswell, 379.

Cities. See Municipal Corporation.

1. Under article 419, Revised Statutes, a city has power to alter the width of streets by exchanging with property owners so as to narrow one and widen another, provided the street so narrowed is not left inadequate for public accommodation. Scott v. City of Marlin, 353.
2. Article 3351, Revised Statutes, does not prevent limitation running in favor of one inclosing a part of a public street in pursuance of an exchange of property with the city for the purpose of altering streets under article 419. Id.

City Bonds. See Municipal Corporation, 2.

Claimant's Bond.

1. A claimant of property seized under judicial process who has, under the statute, given bond stipulating that if he fails to establish his right to the property he will return it "in as good condition as when he received it," or pay its value, is not entitled to have excluded from consideration a deterioration in the condition and value of the property resulting from reasonable wear and tear incident to its careful use while in his possession, since the statutory requirement as to the condition is an absolute one. Parlin v. Coffey, 218.
2. Where the court had properly submitted the issue whether the property, when tendered back, was in as good condition as when claimant received it, a requested charge as to determining the condition of the property, not called for by the evidence and which could only have served to confuse the jury, was properly refused. Id.
3. Where, in an action to enjoin a judgment for the value of an engine on the ground that plaintiff, as a statutory claimant thereof, had duly tendered back the property itself, and the pleadings and evidence, to which no objections were made, described the engine as consisting of a carriage, boiler, and other parts, it was not error for the charge of court, in submitting the issue as to the condition of the engine when tendered back, to describe it by a specification of such parts. Id.
5. Under the article of the statute making fire insurance companies liable for the full amount of the policy in a case of total loss of property other than personal, a building is to be regarded as a total loss where the remnant left is inconsiderable, compared with the part entirely destroyed, and is not such as to constitute a sufficient basis upon which to restore the structure. Rev. Stats., art. 3089. Murphy v. Insurance Co., 241.
6. The fact that part of one wall of a brick building destroyed by fire was used in constructing another building on the site of the destroyed one, the wall so used being a division wall and such use of it being over the protest of the constructors, does not prevent the loss of the building from being a total one within the meaning of the statute. Insurance Company v. Garlington, 66 Texas, 103, followed, and Insurance Company v. McIntyre, 90 Texas, 170, distinguished. Id.
7. In determining whether there has been a total loss of a building by fire, the foundations are not to be considered, as the contract of insurance is made with reference to the part of the structure above ground. Id.

Codification. See Towns, 3.

Collaterals. See Promissory Note, 3.

Collateral Attack. See Jurisdiction, 3.

Commissioners Court. See Municipal Corporation, 2.

Common Carrier. See Carriers.

Common Source. See Trespass to Try Title, 1.

Community Property. See Pleading, 1; Presumption.

1. Where a surviving husband, after his wife's death, bought land and paid for it out of his earnings from a gin and farm that were community property, this did not affect the land with the character of community property, though the husband might be indebted to the community estate for the money invested in it. Griffin v. McKinney, 432.
2. Where the land in controversy was acquired through an exchange for it of other land in which plaintiff had an equitable community interest, and the jury so found, a judgment in defendant's favor for title to all the land in suit was not warranted. Hillen v. Williams, 268.
3. Where an original community interest in the tract so given in exchange was enhanced by reason of improvements placed thereon by the community, the equitable community interest should be measured by such enhanced value of the land at the time it was exchanged for the tract in controversy. Id.
4. Where land bought by the husband before marriage is, in the administration of his estate, set apart to the widow as a homestead, the fact that she presented no claim against the estate for an interest in the land by reason of community funds having been used to pay for it, and of improvements placed on it by the community, does not estop her from asserting her community claim against one acquiring the land from the heirs of the husband, nor render such claim res adjudicata. Id.
5. Where community debts existed, the survivor, being clothed with a general power to sell for their payment, must determine the necessity for sale, and the title of a purchaser, in the absence of fraud, can not be made to depend on the actual existence of such necessity. Cage v. Tucker Heirs, 48.
6. Proof that no actual necessity for the sale existed is admissible, in such cases, only on the issue as to whether the sale was fraudulent and collusive. Id.
7. A charge should not require proof that the community debts authorizing sale by the survivor were bona fide, where no issue was made as to their validity. Id.
8. The purchaser of community property from the survivor selling to discharge community debts need not show that he paid a "fairly adequate" consideration, to sustain his title. Id.

Compromise. See Life Insurance, 8.

Conclusion of Law. See Assignment of Error, 2.

Condemnation. See Eminent Domain.

Consideration. See Failure of Consideration; Community Property, 8; Evidence, 19; Life Insurance, 9.

Conspiracy. See Evidence, 5.

1. Where the evidence sufficiently established an alleged fraudulent conspiracy, declarations made in pursuance thereof by one of the coconspirators were admissible in evidence over the objection that they were hearsay. Hughes v. Grocer Co., 212.

Conspiracy—continued.

2. Upon an issue of fraud and for the purpose of showing the interest of a defendant and his motive for entering into the alleged conspiracy, by which the property in controversy was purchased at a collusive sale, the charter of a mercantile company showing on its face that he was a stockholder therein (such company having bought the property at that sale) may be given in evidence. Id.

Constitutional Law. See County Bonds, 5; Eminent Domain, 2; Life Insurance, 5; Towns, 2.

The Act of 1897 (General Laws 1897, page 205) disorganizing Loving County and attaching it to Reeves County, and providing that the commissioners court of the latter shall audit claims against Loving County and levy and collect taxes on the property in Loving County for their payment, is a general and not a local law within the provision of the Constitution requiring that no local or special law shall be passed unless thirty days' notice of intention to apply for its passage has been first duly published, since the above stated act, though relating to only two counties, deals with the political division of the State, affecting its judicial organization, its taxes, revenues, and school fund. Clarke & Courts v. Reeves Co., 463.

Contempt.

Whether libelous criticism of judicial action, published after the final disposition of the case in which it was had, can be punished as contempt of court, questioned but not decided. Taylor v. Goodrich, 109.

Continuance.

1. Where a continuance is applied for on the ground that plaintiff's amended petition, filed just before the trial, set up new matter which was a surprise to the defendant, the court's action in refusing the continuance will not be reviewed in the absence of the original petition from the record. Railway v. Crowder, 536.
2. Where an application for a continuance is made in order to obtain the testimony of an absent witness, it should specifically set forth the efforts made to procure his testimony, and a general statement that the applicant had caused "diligent search" to be made for the witness is insufficient. Id.
3. Where there had been a mistrial, and the court reset the cause for trial again during a week of the term for which no jury had been provided, it was not error to refuse defendant's application for a continuance made on the ground that it was entitled to a jury drawn by the jury commissioners. Id.

Contract. See Contract of Sale; Counties; Rescission; Vendor and Purchaser.

1. In an action to recover damages for breach, on the part of defendant, of a contract to sublet and surrender a storehouse to plaintiff, in consideration of $250 cash paid, and not to do business therein during a specified year, and the damages for a breach thereof were not fixed by the contract or otherwise liquidated by the parties, the amount thereof should have been left to the jury, and it was error for the court's charge to fix, absolutely, the agreed lease price of $250 as the measure of damages for defendant's failure to surrender possession of the house to plaintiff. Noble v. Wilder, 311.
2. For breach of that part of the contract by which defendant agreed that he would not continue to carry on the business of selling groceries in the leased storehouse during the year specified, the measure of plaintiff's damages was the loss he sustained by reason thereof, and not the profits made by the defendant in so carrying on the business. Id.
3. See evidence held to warrant a verdict finding, in effect, that a contract by which the parties were to acquire land under the five years statute of limitations and one-half of it to be then conveyed by one of them to the other, who was to pay half the taxes from year to year, had been abandoned by such other party. Johnson v. Daniel, 587.

Contract of Sale.

1. Where defendant contracted to sell and deliver to plaintiff during the first half of October five car loads of cotton seed oil, in tank cars, to be furnished by plaintiff, it could not justify its breach of the contract on the ground that the cars were not furnished in time, where they reached the railroad station at defendant's mill three days in advance of the expiration of the contract time, and could have been loaded in time, but for defendant's side track to its mill being crowded with seed cars, a condition for which it was primarily responsible. See evidence held to show a substantial compliance on the part of plaintiff as to furnishing cars in time. Oil Co. v. Oil Co., 614.

2. Evidence that it would take defendant six hours to load a tank car with oil was properly excluded, it not being shown that plaintiff had any knowledge of the defendant's facilities for loading. Id.

3. The measure of plaintiff's damages was the difference between the contract price and the market price of the oil at the place of delivery on the last day it should have been delivered; and it did not change the rule that the buyer had by contract resold the oil and had filled that contract with other oil bought at less than such market price, where he would, but for such breach of contract, have also sold such other oil at the same higher market price. Id.

4. In an action to recover a typewriter shipped subject to trial and acceptance, it was error for the court to instruct that if defendant notified plaintiff's authorized agent that the machine was satisfactory before plaintiff revoked its offer to sell, they should find for defendant, where the whole conversation between plaintiff's agent and the defendant, upon which the instruction was predicated, showed that defendant had no intention then of notifying the agent that he accepted the machine, and the only authority shown on the part of the agent was that he was plaintiff's traveling salesman. Printing Co. v. Gin Co., 456.

5. Where the real issue in the case was at to the identity of the machine shipped with one mentioned in plaintiff's prior letter making an affer to sell, a charge that if the jury should find that a certain letter from defendant to plaintiff contained an acceptance, they should return a verdict for defendant, was erroneous in ignoring the question of identity of the machine. Id.

6. Upon the issue as to whether plaintiff offered at $50 the new machine shipped, or whether that offer and price applied to a different machine, it was competent for plaintiff to give in evidence letters written by it to defendant some eight months prior to the transaction, pricing a second-hand machine for $50 and new machines, of the kind shipped, for $102. Id.

Contributory Negligence. See Charge, 4; Railway Company, 8; Telegraph Company, 14.

1. A charge that if plaintiff's wife was frightened in the manner alleged, and threatened with miscarriage, and during that time was conveyed to her home in a wagon, and the same produced or contributed to produce the miscarriage, or if the miscarriage was produced from any cause other than the fright, plaintiff could not recover, is not objectionable as excluding every act of negligence happening after the fright except that referred to in the charge. Railway v. Mitchell, 197.

2. Where, in a personal injury case, the court had given several special charges, one relating to proximate cause and the others to contributory negligence, and to the last one appended the qualification that if the person injured "was guilty of any act of negligence, that is, if she did not act as a person of ordinary prudence would have done under the circumstances, and her negligence caused or contributed to the injury, then she would be guilty of contributory negligence, and plaintiff can not recover; but if she did act as a person of ordinary prudence would have acted, then in no event would her acts prevent the plaintiff [her husband] from recovering on any of the theories submitted in any of the special charges," this stated a correct principle of law, and was not rendered erroneous by the fact that under a strict construction it applied also to the clause relating to proximate cause, to which it had no application and manifestly was intended to have none. Railway v. Eaves, 409.

3. It is presumed that everyone will act with due care, and negligence will not

Contributory Negligence—continued.

be imputed to a person because he fails to anticipate culpable negligence on the part of others,—such as the moving of a train down the track on which such person is walking, without any signals or warning of its approach. See case wherein deceased, run over by a train at a place habitually used by pedestrians is held not to have been shown guilty of contributory negligence. Railway v. Crowder, 536.

4. On the issue of contributory negligence by one who, crossing in front of a street car, was struck by another car moving on a parallel track, see a requested instruction grouping certain facts which would constitute contributory negligence, which was improperly refused. Railway v. Ford, 328.

Conversion. See Parties, 1.

1. Where, in an action for conversion, there was evidence tending to show that the goods had a market value at the time of their conversion, it was error for the court to instruct that the measure of damages was their reasonable value. Lincoln v. Packard, 22.

2. Proof establishing merely that second-hand furniture of the kind involved in the suit was often sold there by persons desiring to leave the city, or who were forced to sell, at from 10 per cent to 60 per cent of its original value, was not sufficient to show the market value of the property. Id.

3. Evidence of what plaintiffs paid for a piano a number of years before could form no basis for the ascertainment of its present value, unless such amount was shown to have been its value at the time of the purchase. Id.

Corporations. See Municipal Corporations; Foreign Corporation; Franchise Tax.

1. The directors of a corporation occupy towards it the position of trustees, and their acts in connection with the property, such as a purchase of it for themselves at a foreclosure sale, are controlled by the principles governing other trustees, as to the obligation of the trusteeship, and in determining what action on their part will constitute a fraud, and what remedies may be applied; and such a purchase by them is held voidable at the instance of the corporation. Railway v. Railroad Co., 167.

2. A railway corporation made a contract for the building of its road with a construction company which was composed in part of, and controlled by, men who were directors of the corporation. Thirty miles of the road were built, and the construction company received bonds of the railway corporation in payment therefor, and the road having then been placed in the hands of a receiver, certain directors of the corporation who were also members of the construction company bought in the entire property and franchises of the road for themselves, the payment therefor being made principally in claims for debts (bought up by such purchasing directors) which had been incurred by the construction company in building the road, and which were a lien against the property. Under the decree of foreclosure ordering the receiver to sell, the purchasers took the property freed of all claims, and as the bonds issued to the construction company were not filed in the receivership proceedings, the effect of the decree of foreclosure was practically to cancel the bonds. Held in an action by the railway company to recover the property and to have the sale decreed to inure to its benefit, that plaintiff could not recover without offering either to pay back to the purchasers the amount so paid out for the property, or to rehabilitate the bonds by taking the property subject to the incumbrance created by them. Id.

Costs. See Counties; Damages, 1; Trust Deed, 2.

1. Where the costs of suit can not be collected from the party against which they are finally adjudged, an execution may, under the statute, issue against any party to the suit for the costs incurred by such party, but not until proper diligence has been used, as by issuance of execution, to collect from the party against which the costs of suit were adjudged. Rev. Stats., art. 2491. Beacham v. Withers, 575.

2. Where a defendant was liable for certain costs, and at the termination of the suit the constable had in his possession by virtue of a distress warrant

Costs—continued.

issued in the case certain property of the defendant which he could have subjected to the payment of such costs, and he delivered the property back to the defendant, he was thereby estopped from claiming such costs from the plaintiff. Id.

3. Where an amendment merely omitted a part of the amount claimed in the original petition, the trial court went beyond sound judicial discretion in taxing against the party all costs up to that time. Watson v. Boswell, 379.

4. The fee of a stenographer employed by the court at the request of a party to the suit to take down the evidence in the case can not be taxed as cost against the other party unless there is an order of court fixing the amount and allowing the item, as required by the statute. Rev. Stats., arts. 1295, 1296. Mansfield v. Hogsett, 66.

Counties. See Bonds; County Bonds; Constitutional Law.

Where certain county officers agreed with the county that if it would turn over to the county attorney for suit thereon all its outstanding county convict bonds, the county should not be taxed with any of the costs in the suits theron, the retention by the county of a part of the bonds was a failure to perform a condition precedent to its right to exemption from liability for costs in suits on the bonds, and the measure of damages for such breach of the contract was not the amount of the further costs that would have accrued to the officers if suits had been brought on the bonds not turned over. Waller County v. McDade, 280.

County Bonds.

1. County bonds issued under the Act of April 14, 1889, for the purpose of funding the county's indebtedness, were not rendered invalid by the fact that, instead of making the principal payable in twenty years, with coupons for the annual interest, the bond and coupons provided for payment each year of the annual interest, and also the 2 per cent of principal for which the act authorized the levy of taxes. Cass County v. Wilbarger County, 52.

2. A purchaser of county bonds showing on their face that they were issued by virtue of an act of the Legislature specifically recited therein is bound to take notice of the purpose and provisions of such act, and the decisions of the courts holding that counties can not issue bonds unless expressly authorized by law to do so. Id.

3. But an innocent purchaser will be protected where the power of the commissioners court to issue the county bonds depended upon facts to be ascertained and conclusions to be reached by that court as to the probable county expenses, and amount of revenue required, and likely to arise from taxation, to meet the same during the life of the bonds, though the conclusion of the court upon such facts was erroneous. Id.

4. Section 9, article 8, of the Constitution, as amended in 1883, did not prohibit the commissioners court from levying, under the Act of 1889, an annual tax to meet the principal and interest of bonds issued for funding general county indebtedness, though such levy, by consuming a part of the 25 cents on the $100 valuation, permitted by the Constitution to be levied for "county purposes," impaired to that extent the power to make future annual levies for meeting the necessary current expenses of the county, the debts so funded being already payable out of taxes to be levied for county purposes. Id.

5. See the opinion for question suggested and discussed, though not authoritatively determined, as to whether, under section 9 of article 8 of the Constitution, as amended in 1883, a county may be empowered to levy a tax for meeting its past indebtedness in addition to the 25 cents on the $100 permitted to be levied for county purposes; and also as to whether the funding of a debt by the issuance of bonds is the creation of a debt within the meaning of the constitutional provisions requiring a tax levy to pay the interest and create an adequate sinking fund to absorb the principal. Id.

6. Where the tax levy made sufficed to meet for the first five years the payment of princapal and interest falling due on county bonds, this made a prima

County Bonds—continued.

facie case, if the burden was upon the holder of the bonds to show sufficiency of the levy; but if it did not, see recitals in the face of the bonds and facts proven sufficient to bring the case within the estoppel declared by the validating Act of April 20, 1899 (amendatory of Revised Statutes, articles 3892-3894), Id.

County Court. See Appeal Bond.

Court. See Judicial Act.

Court of Civil Appeals. See Jurisdiction, 6.

Custom. See Landlord and Tenant, 3.

Damages. See Carriers, 1; Contract, 1, 2; Death; Judgment, 9; Measure of Damages; Mortgage, 1; Rescission, 1, 2; Rents, 2; Telegraph Co., 9.

1. Though a judgment for $390 was reduced and reformed in accordance with appellant's remittitur of the sum of 80 cents, so slight an excess did not justify taxing the costs of the appeal against appellee. Railway v. Davidson, 135.

2. Loss of capacity for the enjoyment of the pleasures of life, though alleged as a basis for damages, is too vague an element to admit of evidence to sustain it. Locke v. Railway, 145.

3. See case held not to authorize the assessment against appellant of damages for delay. Ellis v. Mabry, 164.

4. There can be no recovery of damages for fright alone, but where physical injuries result from the fright, recovery may be had on account of injuries. Railway v. Mitchell, 197.

5. A failure to ring the bell or blow the whistle of a railway train when it is approaching a public crossing can not, as matter of law, be held not to be the proximate cause of a fright and consequent injuries received by a person approaching the crossing. Id.

6. Where the injury appears to be one which naturally would result from a fright, such as miscarriage by a pregnant woman, it will be regarded in law as one which should have been foreseen. See charge held not objectionable because failing to require the consequent miscarriage of plaintiff to have been foreseen as the result of her fright. Id.

7. Damages for mental pain, anxiety, distress or humiliation suffered, if the direct result of a common carrier's failure or neglect to perform its duty, may be recovered, though unaccompanied with physical injury, pain, or suffering. Railway v. Ball, 500.

8. A common carrier is liable in damages for such discomfort and humiliation as proximately result from its action in compelling a white woman and her children to ride in a coach designated for and occupied by negroes. Id.

9. Such damages as result from the humiliation caused by profane language used by the negroes in the presence of plaintiff's wife while in the negro coach were not recoverable where it was not shown that such misconduct of the negroes was known to the carrier or its servants. (Neill, Associate Justice, dissenting.) Id.

10. A verdict against a railway company for $1000 for compelling a white woman to ride in the negro coach for sixty miles is held grossly excessive, and a remittitur of $900 required. Id.

11. Where defendant, in digging a pit on his own land, caused the land of plaintiff, containing valuable sand, to slide into the pit, and appropriated such sand to his own use, the measure of plaintiff's damages was the market value of the sand, and not the difference which was thereby made in the market value of plaintiff's tract. Railway v. White, 278.

12. In an action of damages for personal injuries, including doctors' bills incurred for medical treatment, it is not necessary that plaintiff's petition allege the time and place at which such medical services were rendered, as in an action on account brought for the value of such services. Railway v. Stonecypher, 569.

13. Where plaintiff alleged his lost time to be worth $150 per month, aggregat-

Damages—continued.

ing $385, for which he asked judgment, and also that the injuries had diminished his capacity to labor and earn money, and that his loss of time and personal injuries had damaged him in the sum of $10,000, for which he prayed recovery, the petition was not subject to exception on the ground that he claimed damages twice for the loss of time. Id.

14. Where defendant offered proof that plaintiff, who was a witness in the case, had been indicted for perjury, this was a direct attack upon his truth and veracity such as warranted evidence in rebuttal to show that his reputation was good in that respect. Id.

15. In an action by the wife and children to recover for death of the husband and father, evidence that one of the daughters was afflicted, one limb being paralyzed, and that the father kept a horse and buggy mostly on account of sending her to school, was admissible under article 3037, Revised Statutes, in order to enable the jury to make a proper apportionment of the damages, and if defendant feared such evidence would operate in other ways to its prejudice, it should have requested a charge limiting its effect. Railway v. Crowder, 536.

16. See the opinion for evidence under which the appellate court declined to disturb a verdict for $500 in favor of a railroad fireman for personal injuries, complained of on the ground that the amount was too small. McCormick v. Railway, 321.

Damages for Delay. See Damages, 3.

Death.

1. In an action for damages from injuries resulting in death, defendant may show, as tending to reduce damages, habits of drunkenness, profligacy or indifference to the welfare of his family on the part of deceased. Standlee v. Railway, 340.

2. The fact that an owner of land, then thirty-five or forty years old, went to California in 1854, to work in the mines, leaving his family in Texas, and ceased to write and had not been heard from by them since the beginning of the Civil War, was not, in the absence of evidence of unsuccessful inquiry for him in California, conclusive proof that he was dead and that the land had descended to his heirs in 1900. Ross v. Blount, 344.

Declarations Against Interest. See Will, 2.

Dedication.

1. Where, immediately after the dedication of the park and lake to public use, the inhabitants of the town entered upon their use and continued such use until they were interfered with by appellants, claiming adversely, this constituted an acceptance, and the dedication becomes irrevocable. Gillean v. Frost, 371.

2. It was not necessary that the town corporation should have been created at the time of the dedication, and the right by the dedication passed to the corporation when it was created. Id.

3. Where the original owner of the townsite tract conveyed to a land company all the unsold portions thereof, subject to his deed of the lake to the railway company, containing a reservation of the right of the public to use the lake, and the land company then conveyed the lake tract to appellants by quitclaim, such latter deed did not of itself suffice to put in motion the five years statute of limitations in appellants' favor. Id.

4. A lake may be dedicated to the public use, and is comprehended under the term "grounds" as used in the article of the statute which provides that no right shall be acquired by adverse possession and limitations to any street, sidewalk or grounds belonging to or dedicated to any city, town or county. Rev. Stats., art. 3351. Id.

5. The fact that after the quitclaim deed of the lake tract to appellants, the town corporation assessed taxes thereon against him and collected the same, did not impair the rights acquired by the dedication. Id.

6. Where appellants, after the quitclaim deed of the lake tract to themselves,

Dedication—continued.

attempted to lease the property from the people of the town, this was such a recognition of the right by dedication as prevented the running of limitations in appellants' favor prior to that time. Id.

7. In an action by a town on behalf of its citizens to recover the use of a park and lake dedicated to the public, a judgment in favor of the town which also adjudges that it should not deprive the defendants "or other persons" of the proper or reasonable consumption of water from the lake, is erroneous in so far as it relates to the "other persons," since these latter were not parties to the suit, nor their rights in any way involved. Id.

8. Where the owner of a tract of land divides it into blocks, lots, streets, and alleys, with reservation of a lake and park shown on the plat, which was duly recorded, and in his sales of the lots repeatedly declares that the lake and park are reserved for the public use, this is a sufficient dedication of them to such purpose. Id.

9. Where such owner subsequently conveyed the land covered by the lake to a railroad company, with condition that the lake should be maintained thereon, and a reservation of the right of the public to use the water, in connection with the company, this did not declare a trust in the company in favor of the public, but was merely declarative of a benefit already set apart to the people of the town. Id.

Deed. See Dedication, 2; Married Woman, 2, 3; Will, 1.

1. Where the description of the land in a deed was filled in by the grantor after he had duly acknowledged the instrument, and he then forwarded the deed to the grantee, who accepted it and placed it on record, not knowing that it was incomplete at the time of its acknowledgement, the conveyance was valid between the parties, and its registry imparted constructive notice of the rights of the grantee to third parties who subsequently acquired an interest in the property from and under the grantor. Henke v. Stacy, 272.

2. The statute requiring the notary to enter the facts of acknowledgement and a description of the land affected in a record kept for that purpose are directory only, and his failure to perform such duty invalidates neither the deed nor the certificate of acknowledgment. Id.

3. A deed describing the land conveyed as a "tract of land containing 640 acres, situated in Eastland County, and known as survey No. 480, patent No. 96, Southern Pacific R. R., reference being made to the patent for further description," is not void for uncertainty in the description, no other patent No. 96 ever having been issued to the Southern Pacific Railroad Company, although the true number of the survey covered by patent No. 96 is No. 473, and there is in Eastland County a Southern Pacific Railway Company Survey No. 480 (its patent number not appearing) which, along with all other even numbered railroad surveys, originally belonged to the public school fund, and therefore could not have been patented to the railroad company. League v. Scott, 318.

4. To show delivery of a deed it is necessary not only that it should appear that the instrument had been placed in the control of the grantee, but that the grantor intended it should become operative as a conveyance; and a charge to the jury, as to what would constitute a delivery, pretermitting the question of such intention, was erroneous. Walker v. Nix, 596.

De Minimis Non Curat Lex. See Damages, 1; Usury, 4.

Deposition. See Evidence, 12.

1. It is not a substantial objection to a deposition that the answers are not attached to the commission, and have no caption except "Answers to Interrogatories," where they are returned together in the same package, indorsed as the depositions of the witnesses named. Railway v. Walker, 216.

2. A deposition is not inadmissible because the interrogatories were propounded to Gerald Mullins, and the answers were signed G. C. Mullins, the indorsement on the envelope in which the officer returned them showing the deposition to be that of Gerald Mullins. Id.

Deposition—continued.

3. It was harmless error to admit the deposition of a witness given on a former trial where it was not read or submitted to the jury, and did not differ materially from his testimony given on the stand. Railway v. Eckles, 176.

Description of Land. See Execution, 6, 7; Judgment, 1.

Diligence. See Continuance; Judgment, 3.

Discretion. See Practice in Trial Court, 1.

Distress Warrant. See Landlord and Tenant, 9; Rents, 2.

District Court. See Jurisdiction, 1; Judicial Act.

Dynamite. See Nuisance.

Easement. See Public Road.

Election. See Parties, 2; Trust Deed, 1.

Eminent Domain. See Foreign Corporation.

1. Under Revised Statutes, articles 698, 699, 642, a telephone company has the same right to exercise eminent domain as that given by the law to a telegraph company. Railway v. Tel. Co., 488.
2. Under the Act of April 15, 1899, plaintiff in condemnation proceedings, on appeal by the defendant from the judgment of condemnation, may secure the right to enter on the property, pending the appeal, by making the deposit and bond there required. Id.
3. The Act of April 15, 1899, providing for entry on condemned premises pending an appeal, affects the remedy only, and is not invalid, as applied to proceedings pending when it was enacted, on the ground that it is retroactive and prohibited by the Constitution. Id.

Equitable Assignment. See Garnishment, 1.

Equitable Relief. See Execution Sale, 3.

Equity Jurisdiction. See New Trial, 2.

Estates of Decedents. See Probate Court.

The district court has no original jurisdiction over a suit by the widow of a decedent and her children against his children by a former marriage to recover the homestead, communty property of such first marriage, and their distributive share in the estate, so long as administration on such estate is pending in the county court, which has jurisdiction in probate over all such matters. McCorkle v. McCorkle, 149.

Estoppel. See Community Property, 4; Costs, 2; Homestead, 4; Judgment, 4; Intervener; Lease, 2; Master and Servant, 7.

Statements by plaintiff in an application to the Supreme Court for writ of error on the ground that a judgment of reversal practically settled the case, as he could not procure further evidence, can not be made to operate as an estoppel against his afterwards pleading and proving additional and material facts in the case on another trial. (Neill, Associate Justice, dissenting.) Railway v. Eckles, 176.

Evidence. See Contract of Sale, 2; Damages, 2, 13; Depositions; Fire Insurance, 8, 15; Harmless Error, 1; Hearsay; Land Office Map; Market Value; Parol Evidence; Telegraph Company, 1; Usury, 5; Will, 3.

1. On the issue as to who had the right to designate the route of a shipment by rail, the consignor may testify that the consignee had such right. Railway v. Dennison, 127.

2. Opinions as to value are not properly expert evidence, and the evidence of a witness who had not seen the household goods in question, based on a description and his knowledge of the value of such goods generally, is not admissible. Railway v. Davidson, 135.

3. Evidence as to the financial condition of S., both before and after the purchase for D. of an interest in the business, and statements by S. in relation thereto, were admissible to prove whether he or D. was the real purchaser. Jones v. Drug Co., 234.

4. So, evidence of D.'s prior failure in business and his insolvency was admissible as tending to show a reason for his making the purchase in the name of another, and evidence that, though insolvent, he had some money, tended to prove ability on his part to make the purchase. Id.

5. Statements by D. as to an attempted purchase of a stock of goods by him were admissible, though made when S. was not present, the jury being instructed that they could not consider the same unless they found them to have been made in pursuance of an agreement between D and S. by which D. was authorized to use the name of S. to cover up property he might buy. Id.

6. It was harmless error, if error at all, to admit the testimony of an expert witness for the purpose of showing the manner in which a coemploye should have performed his task, if he had been competent, where testimony of such witness showing the proper manner of doing the work had already been permitted by appellant to go before the jury without objection. Railway v. Jackson, 619.

7. Upon an issue as to whether a servant's incompetency was known to the master, or by the use of ordinary care should have been known, evidence of the servant's general reputation among his fellow workmen for competency or incompetency in the work for which he was employed, was admissible, the witnesses who testified thereto qualifying themselves as experts. Id.

8. Where a witness was asked if he knew the reputation borne by R. at a stated time for competency or incompetency as a locomotive fireman among railroad men in S. and other places, and he answered that he did only from having heard it discussed on a number of occasions, an objection to the evidence as not going to general reputation was untenable. Railway v. Eckles, 176.

9. A party loses his right to complain of evidence as being merely the opinion of the witness where he suffers testimony of the same character from other witnesses to go to the jury unchallenged. Id.

10. Where plaintiff's petition alleges that because of his injuries he paid for medicine a stated sum, he may testify that he paid a larger given sum for medical bills, but the jury should be required to find only for some amount within the sum alleged in the petition. Id.

11. Error in admitting the declarations of one that he was acting as agent for defendant and of his failure to deny such agency when taxed with it, is harmless where there was other evidence sufficient to establish the agency. Parlin v. Miller, 190.

12. Where defendant read in evidence against plaintiff an application by the latter for a continuance in order to retake certain depositions, it was not error to allow plaintiff to read in evidence certain explanatory exhibits attached to the application. Id.

13. Where a physician sues an administrator for medical services rendered to the latter's intestate, the plaintiff is not competent to testify that he treated the deceased and rendered the services sued for, as these are "transactions" with the deceased coming within the inhibition of article 2302 of the Revised Statutes. Garwood v. Schlichenmaier, 176.

14. The charter of the city of Houston is a public act of the Legislature of which the court will take judicial notice, and by virtue of sections 36 and 53 thereof a printed book purporting to contain the city ordinances and to be pub-

Evidence—continued.

lished by authority of the city council, is admissible in evidence as proof of such ordinances without further authentication. Railway v. Washington, 600.

15. It was competent for plaintiff to testify that he had previously crossed the railway track at the place where the injury occurred, a public road crossing, and heard the whistle blown 400 to 500 yards before the train reached there, as this tended to show his hearing was good enough to have detected the whistle if it had been blown as he approached the crossing at the time complained of. Railway v. Mitchell, 197.

16. It was not a variance that an alias execution offered in evidence was described in plaintiff's abstract of title as "an execution." Frazier v. Assn., 476.

17. The Act of Congress of 1898 providing that certain instruments shall not be admissible in evidence unless bearing revenue stamps, applies only to the courts of the United States, and not to the State courts. Watson v. Mirike, 527.

18. A letter by defendant's attorney to plaintiff, to the effect that defendant was ready to consider any reasonable proposition of settlement plaintiff might submit, is not admissible in evidence. Watson v. Boswell, 379.

19. Parol evidence is admissible to show that a note was without consideration, since this does not change or vary the written contract. Id.

20. Where defendant testified that he paid certain money to W. for plaintiff, as a payment on the note sued on, he could corroborate this by putting in evidence an answer filed by plaintiff in an action against him by W., stating that defendant had paid such money to W. for plaintiff. Id.

21. A bill of sale absolute on its face may be proven a mortgage by parol evidence showing that it was intended merely as a security for a debt. Id.

22. Where exemplary damages are sought for an illegal distraint by the landlord, the tenant may, as bearing on that matter, give evidence of loss of time by himself and family, as a result of the seizure of his crop. Id.

23. Testimony that certain books of account show a certain indebtedness is secondary evidence and not admissible. Id.

Execution. See Independent Executor, 4.

1. Where the return on an execution against the interest of a partner in firm property shows a levy, but not the manner in which it was made, the presumption of law is that the officer did his duty and made the levy as the statute directs (Revised Statutes, article 2352); and where the legality of the levy is not raised by the pleading, the return can not be attacked collaterally. Jones v. Drug Co., 234.

2. The ommission of certain fixtures from the description of the property levied on does not affect the validity of the levy as to the other properly seized. Id.

3. Where a partner's interest in a mercantile business was levied on and sold under execution, but the firm continued for some months thereafter to carry on the business at a profit, selling the old goods and replenishing with new from the proceeds, the execution purchaser, suing for the debtor partner's interest, was not limited to the goods bought by him which were actually in stock at time of the trial, but was entitled to compensation for the property disposed of, as for a conversion. Id.

4. Since the intervening trustee in bankruptcy was entitled to recover all the property sued for except the part which plaintiff, the execution purchaser, was entitled to, and since intervener and plaintiff had agreed upon a division of the recovery satisfactory to themselves, it was not a tenable objection on the part of the defendants that plaintiff's proof failed to show the extent of plaintiff's interest and the value of the goods converted. Id.

5. Where S. had loaned D. the money to buy the interest in the stock, and the purchase was made for D., although the title was taken in the name of S. for the purpose of protecting the property from D.'s creditors, the property belonged to D., and was subject to the levy of an execution against him. Id.

6. A description of property levied on, in the return of an execution, as lots 1, etc., "in block 7 of East Waco, situated on the northwest side of Elm street," etc., was sufficient to admit parol evidence to identify it, though there appeared to be other lots and blocks in East Waco bearing the same numbers and lying in

Execution—continued.

a northwest direction from Elm street, but not on such street. Frazier v. Assn., 476.

7. Parol evidence is admissible to remove a latent ambiguity in the description of the land conveyed in a sheriff's deed, as in case of other conveyances. Id.

8. Where the amount bid by plaintiff at his own execution sale is grossly inadequate, and the defendant in execution is possessed of personal property subject to execution sufficient to pay the debt and has not been called upon to pay the execution or to point out property, and a levy is made by the officer upon real estate and he fails to give notice thereof to the defendant, the jury is justified in finding that the constable's deed should be set aside. Johnson v. Daniel, 587.

9. Actual notice of the sale of land to the defendant in execution will not dispense with the necessity of notice to him of the levy of the execution which the statute requires the officer to give. Id.

Execution Sale. See Judicial Sale.

1. A sale of land under execution, made after the death of the judgment defendant, is void, although eight years have elapsed since his death and no administration has been had on his estate. Fleming v. Ball, 209.

2. Where a judgment debtor dies, if the judgment is not proven up and paid in the course of administration on his estate, as provided in Revised Statutes, article 2332, the holder of the judgment should, after the time for administration has elapsed, sue the heirs for the debt and to revive the judgment. Id.

3. Where purchasers of land at an execution sale void because made after the death of the judgment defendant, sue his heirs in the ordinary form of trespass to try title, asking no equitable relief, the rule that the purchase money paid for the land at the void sale must be repaid before title will be decreed to the heirs has no application, and whoever shows the superior legal title to the land must prevail. Id.

Executory Contract. See Limitations, 5.

Executor. See Independent Executor.

Expert Evidence. See Evidence, 6.

Where there is no conflict in the evidence of the facts upon which an expert witness is called to give an opinion, a question which asks him to state, assuming the testimony to be true, his opinion thereon as to the point at issue, is not objectionable as requiring him to pass upon the evidence; nor is it necessary, if there be no conflict in the evidence, that the questions should be put in hypothetical form. Railway v. Eaves, 409.

Express Trust. See Limitations, 3.

Failure of Consideration.

Where, as part consideration for a mortgage, the mortgagees agreed to advance to the mortgagor $1000 to be used by him in trading, and did advance $500 thereof, but were never called on by him for the balance, his wife, a party to the mortgage because her separate property was included therein as security for his debt, had no ground for avoiding the instrument because of failure of consideration. Schneider v. Sellers, 226.

False Representations. See Life Insurance, 7.

Fellow-Servant. See Master and Servant, 9.

1. Where a servant who knows of the reckless character of a fellow-servant, or of his incompetency, whereby it becomes dangerous to work with him, assumes the risk of longer working with him, yet he is not bound to inquire as

Fellow-Servant—continued.

to the competency of a fellow-servant, but may assume that the master will put only safe and competent men to work him. Lawrence v. Railway, 293.

2. The rule that, if the servant had equal facilities with the master for ascertaining the danger incident to the work, he is held to have assumed the risk, does not apply where the injury is caused by the incompetency or recklessness of a fellow-servant, but only where the physical surroundings make the danger as obvious to the servant as to the master. Following Railway v. Lempe, 59 Texas, 19. Id.

3. The unloading of a car by section hands is not operating it within the meaning of the article of the statute making railway companies liable, as to employes engaged in operating its cars and trains, for injury to an employe occasioned through the negligence of a fellow-servant. Rev. Stats., art. 4560f. Id.

Findings of Fact.

That a finding of fact by the trial court is copied into the transcript among the conclusions of law does not deprive it of its character as a finding of fact and its right to be so accepted. Robertson v. Kirby, 472.

Fine. See Mutual Benefit Insurance, 1, 2.

Fire Insurance. See Principal and Agent, 1.

1. The effect of a stipulation in an open policy of insurance on cotton to be purchased and shipped during the season, that risks covered were to be advised to the insurer at its home office, by letter or telegram, as soon as known to the insured, was controlled by the course of dealing between the parties whereby insurer and insured acquiesced in the notice being given by the insurer's local agent, who issued certificates showing the additional property covered from time to time. Insurance Co. v. Bell, 129.

2. A charge submitting the question whether a certain person was agent for defendant, but without defining what would constitute him such an agent, was not erroneous on account of such omission where no instruction on the subject was requested by the complaining party. Id.

3. An insurance broker whose usual course of business, in receiving premiums and issuing certificates showing the property insured from time to time under an open policy and notifying the company of the same, had been acquiesced in by the insurer, was agent of the company in so doing, and not of the insured. Id.

4. Where plaintiff, whose lumber was insured with two different companies by separate policies issued at different times, but covering the same property, brought a single action against both companies to recover for its loss, there was a misjoinder of causes of action, as there was no privity between the defendants and no equities to be adjusted between them. Insurance Co. v. Post, 428.

5. Where a clause requiring a clear space of 100 feet to be maintained between the lumber insured and any dry kiln, is referred to in the body of the policy as being attached thereto and made a part thereof, the assured, in the absence of allegations of fraud or mistake, will be conclusively presumed to have had knowledge of the contents of such clause. Id.

6. Allegations that the insurance agent had knowledge of the fact that the lumber was piled within less than 100 feet of the dry kiln, and that he agreed to insure it as it was then situated, were insufficient to avoid the effect of the clear space clause. Id.

7. Where the insurance agent issued a policy with knowledge of facts such as would render it void in its inception, if its provisions were insisted on, it will be presumed that such provisons are waived, rather than that he fraudulently delivered and received payment for an invalid policy. Id.

8. In an action on an insurance policy the defendant company has the right to introduce in evidence a clause or provision which is attached to the policy and mentioned in the body of it as constituting a part thereof. Id.

9. A parol agreement of the insurance agent made prior to the execution of the policy can not be shown to vary or contradict its terms. Id.

10. The mere fact that the insurance agent had knowledge, at some time prior

Fire Insurance—continued.

to the issuance of the policy, of a condition of the property violative of its terms, will not authorize the presumption that he knew such condition existed at the time the policy was issued, and waived a provision of the policy relating thereto. Id.

11. Where a condition of the property violative of the policy (lumber so piled as to reach within 100 feet of a dry kiln) could readily be changed by the insured, the issuance of the policy with knowledge by the insurer of such condition, waived the requirement forbidding it only to the extent of allowing the insured a reasonable time within which to comply with the policy by removing the lumber. Id.

12. Where a stock of groceries was replenished from time to time by shipments from another store belonging to the insured, who kept itemized lists of the merchandise so shipped, this was not a compliance with a provision in the iron safe clause of a policy on such stock of groceries requiring an inventory of the stock on hand to be taken and preserved. Insurance Assn. v. Masterson, 518.

13. That it is not practicable nor customary to procure from each customer from whom a grocery merchant purchases butter, eggs and chickens a bill or invoice thereof, is no excuse for such merchant's failure to comply with the provision in his policy of insurance requiring an inventory of the stock on hand to be taken in thirty days after the date of the policy. Id.

14. See the opinion for evidence as to requiring proofs of loss after a fire, held not to constitute a waiver by the insurer of a provision in the iron safe clause of a policy requiring the insured to take and preserve an inventory of the stock of goods covered by the policy. Id.

15. Parol evidence that the insured informed the agent of the insurance company soliciting the insurance that she intended to take out additional insurance is not admissible to vary the terms of the policy subsequently issued and containing a clause stipulating against additional insurance unless agreed to by the company in writing indorsed on the policy. Insurance Co. v. Prather, 446.

16. The issuance of the policy with such notice of the intention of the insured to take out additional insurance does not warrant the presumption of a waiver of such stipulation. Id.

17. The provision in an insurance policy against additional insurance is reasonable and proper, and its violation renders the entire policy void. Id.

18. See the opinion for evidence sufficient to show a waiver, by the subsequent conduct of the insurance agent, of a claim by the company of forfeiture of the policy by reason of the insured removing his family from the building, in which his servant continued to sleep at night. Insurance Co. v. Evants, 300.

19. Also, see evidence held by the Supreme Court, upon application for writ of error to show that the building had not become vacant or unoccupied within the meaning of the contract of insurance. Id.

20. In an action on a fire insurance policy by a mortgagee secured as his interest might appear, which was made void as to the insured owner by his alienation of the property and to be avoided also as to the mortgagee on his failure, having knowledge of the alienation, to notify the insurer thereof, the issue as to its avoidance by failure to give such notice should have been left to the jury where there was evidence tending to show that the owner, at the time he alienated the property, was such agent and representative of the mortgagees as to tax the latter with knowledge of the transfer. Insurance Co. v. Davis, 342.

21. An insurance company, where the policy so provides, is entitled, on payment of the policy to a mortgagee protected as his interest should appear, when it had been avoided as to the insured owner by his alienation of the property, to be subrogated to any securities for the debt held by the mortgagee against such owner. Id.

22. The mortgagee protected by an insurance policy as his interest might appear can recover only to the amount of his debt, and where the insured owner has made the policy void as to himself by alienation of the property, evidence is admissible, under proper pleadings, of any payments made by the mortgagor upon the debt up to the time of trial. Id.

Fixtures. See State School Land, 2.

Forcible Entry and Detainer.

Article 2540, Revised Statutes, making the judgment of the county court final in cases of forcible entry and detainer, except where damages are awarded in excess of $100, denies the right of appeal from a judgment of the county court dismissing the appeal of a plaintiff in a justice court from a judgment there for the defendant. Lane v. Jack, 496.

Foreclosure. See Judgment, 2; Usury, 6.

Foreign Corporation.

A foreign corporation which has obtained from the Secretary of State a permit to do business in this State under article 745, Revised Statutes, has the same power to exercise eminent domain as is granted by the law to a similar corporation organized under our law. Railway v. Telegraph Co., 488.

Foreign Law. See Life Insurance, 2, 3; Pleading, 1; Practice on Appeal, 1.

Forfeit. See Vendor and Purchaser.

Forfeiture. See Lease; Mutual Benefit Insurance, 1; State School Land, 20.

Franchise Tax.

The question of want of right of a plaintiff corporation to sue because of failure to pay its franchise tax can not be raised for the first time on motion for new trial. Frazier v. Assn., 476.

Fraud. See Conspiracy, 1, 2; Evidence, 3; Judgment, 5; Life Insurance, 8; Parol Evidence, 1.

Fraudulent Conveyance. See Limitations, 8.

Garnishment.

1. Where a debtor, having funds to his credit in a bank, drew a check thereon in favor of one of his creditors before garnishment of the bank by another creditor, the delivery of the check operated as an equitable assignment of so much of the fund, although the bank had no notice thereof at that time, and the bank was authorized to make payment of the check after the garnishment had been served upon it. Neely v. Bank, 513.

2. A bank, when garnished by creditors of one of its depositors who has become insolvent and who is indebted to it by notes secured by personal indorsement, has the right, as against the garnishing creditors, to set off the deposit so in its hands against such notes, although the notes be not yet due. Id.

General Reputation. See Damages, 14; Evidence, 8.

Growing Crops. See Mortgage, 6.

Guardian. See Homestead, 4.

Harmless Error. See Depositions, 3; Evidence, 6, 11.

1. It was harmless error for the court to overrule exceptions that asserted limitations against an amendment alleging an act not before pleaded, where the case was so submitted as to permit recovery only on the negligence averred in the original petition. Telegraph Co. v. Norris, 43.

2. Errors in the admission of evidence become immaterial where, upon another issue, the judgment was properly rendered in favor of the right sought to be supported by such evidence. Marlin v. Kosmoroski, 335.

Hearsay. See Conspiracy, 1; State School Land, 11.

Heirs. See Trespass to Try Title, 3, 5.

Heirship. See Will, 2.

Homestead. See Estates of Decedents, 1; Jurisdiction, 1; Tax Lien, 1; Vendor's Lien, 1.

1. In a suit to set aside a sale of plaintiff's homestead under a trust deed, defendant, the creditor and purchaser under the sale, could maintain a cross-action to subject other lands of defendant to a judgment lien for the debt under which the sale had been made. Brin v. Anderson, 323.

2. Planting an orchard upon a portion of the land occupied as a home impresses it with that character of homestead right which can not be removed by the husband's statutory designation of the homestead upon other parts of a tract exceeding in extent the homestead allowance. Id.

3. See facts under which a designation of the homestead by the husband in good faith out of a larger tract was held good, though it abandoned cultivated lands more convenient and better than some selected, involved a possible loss of a part of the two hundred-acre exemption, through conflict of a part of the land designated with older surveys, and selected as a part of the exemption separate property of the wife in preference to community property. Id.

4. Homestead rights can not be asserted to defeat a vendor's lien, against a purchaser of the lien notes having no notice that the sale, which was absolute on its face, was merely to raise money and in effect a mortgage. Noel v. Clark, 136.

5. That the surviving wife allows her grown daughters to live with her and to share in the general income of the homestead property, and that the daughters paid taxes on the respective portions thereof allotted to them in remainder, does not show that the wife had, as against the claims of the daughters, abandoned her homestead rights in the property, Salmons v. Downs, 422.

6. An adult unmarried daughter, though a constituent member of the family, has no right in the homestead property, nor in the rents and income thereof, as against the use of the property as a homestead by the surviving parent. Ashe v. Youngst, 65 Texas, 631, followed. Id.

7. Where a surviving wife was guardian of her minor daughter, and the latter, upon her own marriage, gave to the former a receipt in full for her interest in the estate which recited that the guardian "has turned over to me all the real estate belonging to me," this did not raise the issue of estoppel against the guardian to assert thereafter her homestead right in such real estate. Id.

8. Where, in a contest between children and their mother as to homestead property, the verdict of the jury found in favor of the mother's homestead rights, it was immaterial that the verdict did not specifically dispose of certain sums of money the income of the property, since it necessarily followed from the verdict that the mother was entitled to such money. Id.

9. Error in refusing to sustain objections to plaintiff's petition on the grounds of misjoinder, in that it combined a demand for judgment on certain money claims with a suit to recover possession of the homestead, was harmless where no recovery was had on the money demands. Id.

10. Children having no homestead rights as such in the home of their father after the mother's death, such surviving husband can create a valid incumbrance upon his interest in the homestead, and one acquiring title by sale to satisfy such incumbrance is entitled to partition, as against the children inheriting their mother's interest and the surviving husband asserting homestead rights for them and himself. Lee v. Mortgage Co., 481.

11. Against one wrongfully dispossessing them of the land, but afterwards acquiring the father's interest by such sale to satisfy an incumbrance, no recovery for rents could be had thereafter except to the extent of the children's half interest inherited from their mother. Id.

12. See the opinion for evidence held sufficient to show that a rural homestead had been abandoned and another acquired in town. Griffin v. McKinney, 433.

13. When the homestead of a family is exchanged for an improved farm in-

Homestead—continued.

tended to be occupied as a home, their homestead rights attach thereto as against an execution creditor, before any actual occupancy. Rutherford v. Cox, 499.

14. The owner of a homestead exchanged it for an undivided interest in other improved land but executed notes apparently, but not in fact, given for and secured by vendor's lien on the land so acquired, which notes a purchaser bought, with knowledge of this fact, before the new property was occupied by their maker. On the issue of the right to restrain a sale of the land to satisfy the lien, on the ground that it was homestead, the holder of the notes was entitled to an instruction protecting him in his lien as an innocent purchaser if he bought without notice of or outward act manifesting the maker's intention to occupy the land as homestead. Evans v. Daniel, 362.

15. Though one claiming homestead rights had not taken possession of the land at the time the lien sought to be enforced against it attached, his intention to do so, if known to the person acquiring the lien, entitled him to the exemption, where the property was already improved and capable of being a residence, this circumstance distinguishing the case from West End Town Company v. Grigg, 56 Southwestern Reporter, 49. Id.

16. The husband alone has the right to designate the homestead, and the intention which will entitle to claim the exemption in the absence of actual occupancy must be his, and not that of the wife. Id.

Husband and Wife. See Community Property; Marriage; Homestead, 2, 3, 16.

Improvements. See State School Land, 2, 3.

Improvements in Good Faith. See Trespass to Try Title, 3.

Independent Executor.

1. An independent executor having power under the will to sell the property of the estate for the payment of debts, has the power to mortgage the property to secure such debts. Stevenson v. Roberts, 577.

2. Such mortgage is not rendered void nor are the rights of good faith creditors and purchasers under it affected by the fact that the independent executor may have abused his discretion in determining whether it was necessary to give the mortgage, or in selecting the property to be mortgaged. Id.

3. Where land was devised to an independent executrix with remainder to plaintiffs, and such executrix, joined by her husband, mortgaged the land to secure debts of the estate, and under foreclosure of the mortgage the land was bought for the joint benefit of the purchaser and the husband, and one-half of it subsequently conveyed by such purchaser to the husband who sold it to defendant, the fact that defendant knew that the husband was in some way connected with the foreclosure sale would not in law make his purchase and occupancy of the land in bad faith so as to preclude him from recovering the value of the improvements placed by him thereon. Id.

4. An averment that defendant had qualified and was acting under a will making her an independent executrix, in the absence of exception, authorized proof that she was acting as executrix, under article 1995, Revised Statutes, without control of the probate court, and was sufficient to support a judgment awarding execution against her as such, instead of certifying the judgment to the probate court for classification and payment. Ellis v. Mabry, 164.

Injunction.

Where a city has brought a number of suits against different parties to enforce against different pieces of property its lien for taxes, an injunction will not lie at the joint suit of such defendant owners to restrain the prosecution of the tax suits upon grounds that would be fully available as a legal defense therein. McMickle v. Hardin, 222.

Innocent Purchaser. See County Bonds, 2, 3; Homestead, 4; Presumption.

Insolvent Debtor. See Garnishment, 2.

Insurance. See Fire Insurance; Life Insurance; Mutual Benefit Insurance.

Intention. See Homestead, 13.
Evidence of, admissible.

Interstate Law. See Life Insurance, 2, 3.

Interstate Shipment. See Carriers, 4.
The cases of Houston Direct Navigation Company v. Insurance Company, 80 Texas, 1, and Railway v. Sherwood, 84 Texas, 133, as to the right of railway companies in interstate shipments to make contracts exempting themselves from liability, have been overruled by the later cases of Railway v. Solan, 169 United States, 133, and Armstrong v. Railway, 92 Texas, 117. Railway v. Walker, 216.

Intervention. See Judgment, 12; Jury, 2; Pleading, 6; Receiver, 3.
An intervener occupying, as against another intervener, the attitude of a defendant, must deny the allegations of the latter pleading an estoppel against him, or the latter will be entitled to recover; the rule of pleading between them being the same as between original plaintiffs and defendants. Bruce v. Bank, 295.

Judicial Act.
1. District courts, in proceedings for contempt, exercise a general jurisdiction over a subject committed to them, and hence are acting judicially in determining what facts authorize them to render judgment. Taylor v. Goodrich, 109.
2. For the exercise of judicial discretion, when sitting as a court over a subject within its jurisdiction, a judge can not be held liable in damages to one claiming to be injured as the result of the official conduct, whatever his motives. Id.
3. The action of a district court in punishing for contempt the author of a libelous criticism upon its proceedings made after their termination, if erroneous in law, was still a judicial act, determining a question within its general jurisdiction which could not render the judge subject to an action for damages. Id.
4. A proceeding of a court imposing punishment for contempt is not a criminal case in which, by the Constitution and statutes, the Governor of the State has power to pardon. Id.

Judicial Sale. See Jurisdiction, 5; Execution Sale.
Where the plaintiff purchases land under his own foreclosure proceedings, and conveys it to a purchaser for value, a subsequent reversal of the judgment upon writ of error sued out by the defendant therein, operates to extinguish the title of such second purchaser. Cordray v. Neuhaus, 247.

Judgment. See Allegation and Proof; Judicial Sale; Tender.
1. A judgment by which a party recovers all of a designated survey not in conflict with another specified survey which can be easily identified upon the ground it not void for uncertainty. Barrow v. Gridley, 13.
2. Where, after the State had sued to foreclose a lien for taxes, the defendant died, and the property, taken by the widow at its valuation, was set aside to her by the probate court in lieu of the allowance for a homestead, the district court had jurisdiction to determine in the tax suit, to which the widow, as administratrix was made a party, the question of priority between the tax lien and the widow's homestead allowance. Following George v. Ryon, 94 Texas. State v. Jordan, 17.
3. No sufficient excuse for failure to file answer appears from the fact that the general attorney of a railway sent the citation to the attorneys charged with

Judgment—continued.

the defense of the case three days before appearance day, and in time to file an' swer but for unforeseen contingencies which prevented it, where it appeared that citation had been served and received by such general attorney twelve days before appearance day. Railway v. Davidson, 134.

4. Where a landowner empowered her attorney to confess judgment for a given amount of lien debt, and he confessed judgment for a much larger amount, the letter of attorney being copied into the judgment entry, the owner of the land was not estopped from asserting her right to have set aside a foreclosure sale of the land made under the judgment which thus showed on its face to be unwarranted. Cordray v. Neuhaus, 248.

5. A settlement by defendant of certain California judgments against him for much less than their face will not be set aside on the ground that it was obtained through his fraudulent representations that he was insolvent when in fact he then owned eight sections of Texas lands, where the evidence shows that, prior to such settlement, but after rendition of the judgments, defendant had conveyed the lands to his wife for "love and affection," and plaintiffs then knew of these facts, and were advised that, although defendant claimed that the lands were the separate property of his wife, they could be subjected to the payment of the judgments. Baggs v. Hale, 309.

6. In an action on judgments, brought by an assignee thereof, the execution of the transfer of the judgments should be proved before they are admitted in evidence. Id.

7. A judgment vacating and setting aside a former judgment by default is warranted by evidence showing that in such former suit there was, because of the existence of smallpox and quarantine, an oral agreement between counsel for the parties that the case should be passed and continued until the next term, whereby the defendants were prevented from attending court and of learning of such default judgment until after the term had expired. Johnson v. Daniel, 587.

8. Article 1357 of the Revised Statutes, authorizing reformation of a judgment in vacation, applies only to cases of mistake, miscalculation, or misrecital, such as are there enumerated, amendable by the record, but does not authorize reformation on the ground that a previous amendment increasing the judgment against defendant has been made during the term, after his motion for new trial had been overruled, and without notice to him. Segal v. Armistead, 562.

9. A consent decree entered in the United States Circuit Court for the Eastern District of Texas, reciting that S., one of the defendants, appeared by T., his attorney, and consented to the decree, not being, as to the Texas State courts, a domestic judgment, may be collaterally attacked therein for want of jurisdiction over the person by showing that S. was not cited in the case, and never authorized T. to appear for him and consent to such decree. League v. Scott, 318.

10. Where plaintiff recovers a judgment for damages resulting from personal injuries, defendant will not be heard to complain that it directs one-half the amount thereof when collected to be turned over to counsel for plaintiff. Railway v. Washington, 600.

11. Where, in a suit of trespass to try title, the plaintiffs sought, on the ground of fraud, to set aside certain partition judgments affecting their title to the land, and all parties to such judgments were made parties to the suit, as also subsequent purchasers of the land claiming under the partition, and the court in which the suit was brought had rendered the partition judgments and had jurisdiction to set them aside, the attack so made on the judgments was a direct and not a collateral one, and the action such a one as plaintiffs were entitled to maintain. Schneider v. Sellers, 226.

12. Plaintiffs, suing to set aside a judgment of partition between themselves, as minor heirs of their deceased father, and their mother, alleged that the property partitioned was the separate estate of their father; that after their father's death their mother married again, and that they were in the care, custody and control of their stepfather at the time the partition judgment was rendered; that both their mother and stepfather knew that the land was separate and not community property, and fraudulently withheld the facts from the court, and that those of the defendants now claiming under the judgment as purchasers had notice of the fraud. Held, that the allegations stated sufficient grounds for vacating the judgment as to all the defendants. Id.

Judgment—continued.

13. One intervening in a receivership upon a judgment of foreclosure against property in the hands of the receiver can not, in the absence of allegation of fraud or mistake in his former judgment, have the same so corrected and enlarged as to foreclose on interests in the property not affected by such first judgment. Eck v. Warner, 338.

14. An averment in a proceeding to foreclose a judgment lien that the judgment was "alphabetically and otherwise duly indexed and cross-indexed as required by law in such cases," was sufficient. Brin v. Anderson, 323.

15. A judgment by default on a vendor's lien note was conclusive as to the amount of the debt in a subsequent action between the parties involving the validity of the lien as against a claim of homestead rights. Evans v. Daniel, 362.

Jurisdiction. See Plea in Abatement; Plea of Privilege; Parties, 1; Res Judicata, 1.

1. Where, by agreement of the parties, a case was transferred for trial to another county under article 1270, Revised Statutes, and the court duly entered its order "that the venue in this case shall be and is hereby changed" to such other county, the latter's jurisdiction attaches, notwithstanding that the agreement provided that all papers then on file in the cause should be transmitted, and when so transmitted the court of such latter county should have jurisdiction, and the clerk of the court had failed up to the time of trial to transmit all the papers as agreed on. Jones v. Bourbonnais, 94.

2. The question of the jurisdiction of the latter county, after transfer of the case to it, should have been raised, it seems, by plea therein. Id.

3. Where a special and limited authority has been prescribed for a court of general jurisdiction, as in enforcing a sale of land for taxes, nothing is taken by intendment in favor of its action, even in a collateral attack on its judgment, but it must appear by the recitals of the record itself that the facts existed which authorized the court to act, and that it acted within the limits of its authority. Cordray v. Neuhaus, 247.

4. The Galveston city charter of 1871 and ordinances thereunder had the effect of rendering the jurisdiction of the District Court of Galveston County in the sale of lands for taxes a special and limited one. Id.

5. A sale of land for city taxes, made to the city under decree of the District Court of Galveston County foreclosing the tax lien, conferred no title where the amount of such taxes was less than $100, and the city charter and ordinances were not complied with in that notice of the sale was given for only twenty-two instead of thirty days, and that no confirmation of the sale was ever had. Id.

6. The Court of Civil Appeals has no jurisdiction in a case originating in the justice court where the amount in controversy and the amount for which the judgment was rendered is less than one hundred dollars, although the county court may have erroneously dismissed the appeal thereto from the justice court. Following Railway v. Rowley, 22 Southwestern Reporter, 182. Allen v. Hall, 178.

7. Williams v. Sims, 4 Willson Con. Cases, section 151, and Loper v. State, 17 Southwestern Reporter, 1090, not followed, and Pevito v. Rogers, 52 Texas, 581, held not to be in conflict with the ruling in this case. Id.

8. The amount of the demand as set up in the amended petition upon which plaintiff goes to trial is the amount in controversy, and this amount prima facie determines the jurisdiction of the court. Watson v. Mirike, 527.

9. An objection that plaintiff's petition (in an action in the district court) shows his cause of action to be for a less amount than the jurisdiction of the court, is not well taken where it appears from the pleadings that at least $600 was then due under the terms of the contract sued on. Supreme Tent v. Cox, 366.

Jury. See Continuance, 3.

1. It is within the province of the jury to give credence to a part only of the testimony of a witness, and to reject the other part. Railway v. Eckles, 176.

2. An intervener and a defendant whose interests are not adverse are, as to jury challanges, to be regarded as one party, and must share together the number of peremptory challenges allowed by the statute to a party, and the intervener

Jury—continued.

is not entitled to have the court direct whom the defendant shall challenge. Bruce v. Bank, 295.

3. Error of the court, if it was error, in refusing intervener's request to compel an equal division with defendant of the statutory number of challenges was harmless where recovery was properly had against intervener upon the state of the pleadings alone. Id.

4. It is not sufficient ground for challenge for cause that certain jurors had heard of two former trials of the case and the result thereof, it not being shown that they were influenced by such information. See opinion for case where a challenge to the array of jurors on the ground of a general bias throughout the county was held to have been properly overruled. Railway v. Crowder, 536.

Justice Court. See Appeal Bond.

Knowledge. See Fire Insurance, 5, 6; Master and Servant, 5.

Land. See State School Land; Survey; Trespass to Try Title.

Land Certificate. See Survey, 1.

A valid sale of an unlocated land certificate may be made without being evidenced by a conveyance in writing. See evidence held sufficient to show a valid probate sale of such certificate. Anderson v. Wynne, 440.

Landlord and Tenant. See Limitations, 7; Rent.

1. In an action by the lessee for breach of a farm lease, the rent for which was to be one-half the returns from sale of the products raised, plaintiff's petition, alleging his eviction, and his damages at $500, the value of his one-half of the crop which would have been raised on the farm during the unexpired term of the lease, was not subject to general demurrer on the ground that the damages were speculative, uncertain, and too remote. Brincefield v. Allen, 258.

2. The measure of plaintiff's damages was the reasonable market value of one-half of the crop he would be reasonably expected to have raised on the premises during the unexpired term, less such amount as he earned, or by the use of reasonable diligence might have earned by engaging in a different business after the breach of the lease contract. Loyd v. Capps, 29 Southwestern Reporter, 505, criticised and limited. Id.

3. Where a written lease did not specify the length of the term, a parol agreement as to its length could be shown, and in the absence of such agreement evidence of a custom or usage in this respect could be shown under proper allegations. Id.

4. Where the lessor had breached the lease contract and evicted the lessee, a demand by the latter for a compliance with the terms of the contract is not necessary to complete his cause of action. Id.

5. A person is not excused for an act of God, where his own negligence is a concurrent cause of the injury; as where a landlord who was bound to keep the building in repair suffered the margin of the tin roof to become and remain loose, whereby a strong windstorm rolled the roof back, admitting rain, which damaged the tenant's goods. Lovejoy v. Townsend, 385.

6. Where the landlord expressly contracted to repair and keep the roof in repair it is immaterial whether or not the roof was in a defective condition at the date of the lease. Id.

7. The rule that the servant of a tenant is in privity with the tenant and bound by the terms of the contract between the landlord and tenant applies where there is an actual and bona fide contract of tenancy, but not where such contract is merely a sham lease designed and intended to protect the landlord from liability, and the real relation between the landlord and the ostensible tenant or lessee is that of principal and agent. Investment Co. v. Barclay, 543.

8. A provision in a lease exempting the landlord, in the event he should distrain for rent, from any claim for damages alleged by the tenant for any cause

Landlord and Tenant—continued.

whatever, is valid, and will exempt the landlord from damages arising from a legal distraint, but not from an illegal and unjust suing out of the writ. Watson v. Mirike, 527.

9. Where a distress warrant is wrongfully sued out the value of time spent, and expenses incurred by the tenant in regaining possession of his property by replevying it, is a proper element of damage. Id.

Landlord's Lien. See Mortgage, 6.

Land Office. See Archive.

Land Office Map.

A map compiled in the Land Office, and lithographed, printed and published by that office, is an official map, and admissible in evidence for the purpose of identifying the location of surveys. Barrow v. Gridley, 13.

Lease. See Landlord and Tenant.

1. See evidence held sufficient to show that a lease of a hotel, executed by its owner, a Missouri corporation, to a Texas corporation, was merely a sham and device to protect the former against liability, the lessee corporation having been organized by and from among the stockholders of the former corporation, no part of its capital stock having ever been paid in, and its management of the hotel being in reality that of the owning corporation. Investment Co. v. Barclay, 543.

2. See evidence held not sufficient to raise the issue as to whether a lessor was estopped from claiming the forfeiture of an oil mining lease on the ground that the lessee had failed to begin a well on the land within the time stipulated in the lease contract. Forney v. Ward, 443.

3. Where the lease provided that it should be void in case no well was begun by the lessee within a specified time, and on the last day of such time the lessee hauled some lumber on the land with which to construct a derrick for boring the well, the court correctly refused to instruct, as a matter of law, that this was a beginning of the well, but properly left that question to the jury in connection with testimony as to the general understanding among persons engaged in the business of boring wells as to when a well was begun. Id.

Legal Title. See Execution, 5.

Levy. See Execution, 6.

Lex Loci. See Telegraph Company, 9.

Libel.

1. A communication, to be privileged, must be made by one who rests under some duty, public or private, to the party to whom the statement is made, either legal, moral or social. Davis v. Wells, 155.

2. Where the duty to furnish the statement is so well defined that the law itself gives character to it, the court should determine that the duty existed, as matter of law, otherwise the question of privilege is one of fact, as in the communication here shown. Id.

3. Express malice and want of good faith are not necessarily the same, and the existence of either or both should be left to the jury where there is any evidence warranting their submission. Id.

Liens. See Foreclosures; Subrogation; Married Woman, 3; Tax Lien; Trust Deed; Vendor's Lien.

Life Insurance.

1. A certificate in a mutual benefit order was issued to M., a member, payable at his death to his mother. M. afterwards married and died after the death of his mother, without having designated any other beneficiary. The constitution of the order provided that at the death of a beneficiary member the sum specified in the certificate shall be paid to the person named therein, who should be "his wife, children, adopted children, parents, brothers, sisters, or other relatives," and in case the certificate was payable to one of such relatives who should, at the time of the death of the member, be also deceased, and no designation or change had been made by the member in writing upon his certificate during life, it should be paid "to the next living relative in the order named in this section." Held, that the certificate was payable to M.'s wife, to the exclusion of his brothers, as she was the next in order of relationship, although not, as were "brothers," named next after the mother, the original beneficiary. Mattison v. W. O. W., 215.

2. Where a life insurance policy stipulates that it shall be construed and governed by the laws of another State, the statutes of such other State applicable thereto are to be treated as part of the written contract, and can not be waived by the parties. Insurance Co. v. Orlopp, 284.

3. Where the statute of another State governing the contract has received any peculiar construction by the courts of such State which is relied on in the courts of the State, such construction must be pleaded and proved here like any other fact, and where this is not done, a refusal here to follow such construction is not violative of the provision of the Federal Constitution requiring full faith and credit to be given to the public acts, records, and judicial proceedings of each State. Id.

4. Where a life policy, made subject to the laws of New York (which prohibit the forfeiture of a policy for nonpayment of a premium unless notice is given fifteen days before it is payable), was duly declared lapsed for failure to pay a premium, but was afterward reinstated on payment of a part of the premium and the giving of notes for the balance containing a provision that all benefits should be forfeited if the notes were not paid at maturity, this constituted a renewal of the policy, and the insurer could not, upon a failure to pay such notes at their maturity, declare the policy lapsed without having given to the insured the prior notice of the time when the notes fell due. Id.

5. The provisions of the Texas statute imposing a penalty of 12 per cent and the payment of attorneys fees on life insurance companies for failure to pay a loss within the time specified in the policy, is not violative of the fourteenth amendment of the Federal Constitution as denying the equal protection of the law. Id.

6. Where a life insurance policy stipulated that in case it should, after three years, become void by reason of nonpayment of any premium due thereon, the insurance company would issue in lieu thereof a paid-up policy for the amount of the premiums already paid, provided the policy, duly receipted, should be surrendered to the company within six months after such default in payment, a compliance with such condition precedent within the six months is essential to a recovery of such paid-up insurance, time being of the essence of the contract in this regard. Insurance Co. v. Evans, 563.

7. A life insurance policy containing the clause, "If the terms of this contract be complied with, it shall be incontestable after one year from its date," was not, after the expiration of that time, rendered void by the fact that the insured in his application had made false statements as to his habits of temperance and previous applications for insurance, and had warranted their truth. Insurance Co. v. Villeneuve, 356.

8. The effect of the "incontestable" clause in such policy upon its avoidance by false warranties in the application was not so clear as to make the statement of an agent of the insurance company to the beneficiary that the policy was avoided by their falsity, whereby a compromise of the claim with the beneficiary was effected, other than a mere opinion of the agent, which he might have honestly held, as to matter of law, upon which, as he occupied an adverse and not a fiduciary relation, the beneficiary had no right to rely, and which was not sufficient to avoid the compromise for fraud. Id.

9. Unless the contention that the policy was void was made in good faith,

Life Insurance—continued.

the settlement, by payment of a less sum for a liquidated obligation, was without consideration as a release of the balance of the debt, and the question of its validity, dependent on such good faith, should have been left to the jury. Id.

10. The statute providing a penalty of 12 per cent, etc., for refusal by a life insurance company to pay the amount of the policy (Revised Statutes, article 3071), applies to policies issued by all suche companies permitted to do business in the State, though the policy be made payable at the home office in another State which has no such law. Id.

11. Where part of the amount insured has been paid before suit the penalty provided (Revised Statutes, article 3071) should be 12 per cent on the balance unpaid and reasonable attorney's fees thereon. Id.

Limitations. See Amendment, 1; Cities, 2; Dedication, 5, 8; Promissory Note, 2.

1. That six years elapsed after the reversal of a case by the appellate court before plaintiff took out the mandate ana filed an amendment below, did not necessarily bar his right to further prosecute the case, there being no statute limiting the time within which the mandate must be taken out, and, in this cas, no issue made as to abandonment of the suit. Telegraph Co. v. Norris, 43.

2. Where the field notes of a deed, though calling for the line of the original survey of which it purports to convey a fractional part, gives such further description, by established and marked corners, as to the location of such line as affords reasonable notice to the true owner of a strip of land adversely occupied under the deed—and being in fact part of the next adjoining survey—that such line is claimed to be at a different place from that claimed by the owner of such adjoining survey, the deed will suffice to support the five-year statute of limitations. Bean v. Whitney, 72.

3. In 1840 L. conveyed to H. an eleven-league grant of land, and H., owning also another such grant, executed an instrument by which he conveyed to L. one-third of the proceeds which he might receive from sales by himself of any portions of the twenty-two leagues of land and bound his executors and administrators to convey any part of the lands that might remain unsold at his death to such persons as L., her husband or heirs, might order. Held, that as to the proceeds of sales made thereunder, the instrument was not a complete declaration of an express, excuted trust against which limitations would not run until repudiation and notice thereof brought home to the beneficiary, but was an executed trust against which the defense of limitations could be interposed. Laguerenne v. Farrar, 404.

4. In order to render the defense of limitations available it is not necessary that there should be a formal renunciation of the trust by the trustee and actual notice thereof to the beneficiary, but it is sufficient if his acts are equivalent to a repudiation and the circumstances are such that the beneficiary must have morally known therefrom that he had abdicated the functions of his office and was converting the trust property to his own use. Id.

5. In so far as the instrument executed by H. related to the lands unsold at his death, it was not an absolute conveyance, but an executory contract for the sale of land, against which the ten years statute of limitations was applicable. Id.

6. The Act of 1895 (Revised Statutes, article 3352, section 3) as to limitation running against a married woman, was not retroactive in its effect, and limitation would run only from the end of the year after its passage. Anderson v. Wynne, 440.

7. A judgment in trespass to try title in plaintiff's favor for the land against a tenant in possession will stop the running of limitations in favor of the landlord, and it does not affect the conclusive force of the judgment that it was one rendered by agreement. Id.

8. An action to subject to the lien of a registered judgment land fraudulently conveyed by the judgment debtor, accrued at the date of the registration and was barred by limitation in favor of the transferee in four years therefrom. Gans v. Marx, 497.

9. The bringing of a suit by the father as next friend to recover damages for injuries to a minor, and its subsequent dismissal for want of prosecution, does not put the statute of limitations in motion against the claim of the minor from and after the date of such dismissal. Railway v. Washington, 600.

Limitations—continued.

10. Where defendant sets up in one plea limitation of one and two years, a plea of minority by plaintiff in reply is sufficient where it mentions only the plea of two years, but sets up facts sufficient to meet the plea of one year as well. Id.

Lis Pendens. See Appeal, 3.

Live Stock. See Carriers, 1, 2, 3; Chattel Mortgage.

Local Law. See Constitutional Law.

Mandamus. See Municipal Corporation, 2.

While mandamus is the proper remedy to obtain a statement of facts on appeal where the trial judge fails to do his duty in making up the statement, the writ requiring him to do so will not issue where the relator fails to apply for it until after the time has expired in which the record should be filed in the appellate court. Capps v. Russell, 257.

Mandate. See Limitations, 1.

Map. See Land Office Map.

Market Value. See Conversion.

A witness is not qualified to testify as to the market value of sand where his testimony shows that he is only repeating the statement of another as to such value. Railway v. White, 278.

Marriage.

1. Marriages such as existed between negro slaves with the consent of their masters were void in law, but where they voluntarily continued the relation of husband and wife after their emancipation, such continuance of the relation is deemed a valid common-law marriage. Wood v. Cole, 378.

2. Where plaintiff, as widow of a deceased former slave by virtue of a slave marriage, sued in trespass to try title for lands acquired by him, it devolved on her to prove that she and the deceased lived together as husband and wife after their emancipation. Id.

Married Woman. See Community Property; Limitations, 6; State School Land, 18; Wife's Separate Property.

1. A married woman is not liable upon a promissory note not given for necessaries, such as one executed jointly with her husband for the purchase money of land. Noel v. Clark, 136.

2. A certificate of privy acknowledgement of a deed by a married woman is sufficient, though her Christian name is left blank, where it describes her as the wife. Id.

3. A deed by a married woman conveying her separate property, and acknowledged before her husband, is void and does not estop her from claiming the land, and as it constitutes neither title nor color of title, it will not support the three years statute of limitations. Silcock v. Baker, 508.

4. Where a husband and wife were jointly sued on the wife's subscription to a railway company, and the husband employed an attorney to defend the suit, the wife's separate estate could not subsequently be charged by judgment in an action brought by such attorney for his fee, in the absence of evidence that his employment was contracted for by the wife, or by her authority. Parker v. Wood, 506.

Master and Servant. See Evidence, 7.

1. Where plaintiff, a locomotive fireman, was injured while out on the side of a moving engine for the purpose of placing an oil can, by being crushed against a coal bin that had bulged out too near the track, a charge upon assumed risk was not erroneous in failing to instruct that if plaintiff knew of the dangerous proximity of the coal bin, he assumed the risk and could not recover,—the evidence tending to show that it was not customary, nor was it the fireman's duty to go along the side of the engine in replacing oil cans while the engine was in motion. Railway v. Gray, 99.

2. It was error, however, to charge, in effect, that if plaintiff knew of the coal bin and its dangerous proximity to the track, such knowledge would not prevent a recovery if he was at the time in the exercise of reasonable care for his own safety, but that such knowledge might be considered in determining whether he was guilty of contributory negligence—since the charge confused the doctrine of assumed risk and that of contributory negligence, and made the master's right of exemption depend wholly on the general law of contributory negligence. Id.

3. If the engine was started towards the bin from a point only about fifty feet distant therefrom, and plaintiff thereafter undertook, by going out on the side of the engine, to replace the can, with knowledge of the bin's dangerous proximity to the track, he assumed the risk, although a reasonably careful and prudent man might have supposed that he could arrange the can and return to the cab in time to avoid the danger. Id.

4. But if plaintiff undertook to replace the can while the engine was standing still, and the engineer, without warning and without plaintiff's knowledge, suddenly and swiftly approached the point of danger, and plaintiff was without contributory negligence, he would be entitled to recover, notwithstanding he may have known of the defect in the bin and may have remained in the employment of the master. (Hunter, Associate Justice, dissenting.) Id.

5. Plaintiff, an employe, was engaged in removing cinders, using a wheelbarrow which he trundled across a temporary bridge of three planks recently constructed there by the foreman for that purpose. Because the ends of the planks were not secured, they slipped, causing plaintiff, who did not know of such defect, to fall and be injured. Held, that it was a question of fact for the jury, and not of law, as to whether plaintiff should be charged with knowledge of the defect. Railway v. Mayfield, 207.

6. See evidence of negligence and a simulated relation of lessor and lessee under which a corporation that owned a hotel was held liable for injuries to servants therein, ostensibly employed by the lessee corporation,—such injuries resulting from defects in an elevator and its improper operation. Investment Co. v. Barclay, 543.

7. The fact that plaintiffs, who were hotel employes, had accepted employment from a corporation which had leased the hotel did not estop them from denying its legal existence and ostensible relation as lessee, where the lessor corporation was in reality still operating the hotel, and the lease was simulated and a mere device to conceal the relation between the lessor and lessee. Id.

8. While it is probably the better practice for the charge to state the qualifications of the master's liability, such as may arise from contributory negligence and assumed risk, in immediate connection with the statement of such liability, yet a failure to do so does not necessarily operate to confuse or mislead the jury where in connection with the statement of the liability, reference is made to previous portions of the charge where such qualifications are specifically stated. Railway v. Jackson, 619.

9. The master is not liable for injuries to a servant while engaged in work not in the course of his employment, and which he has undertaken at the call for assistance of a fellow-servant, unless the act of the latter in calling for such assistance was authorized by the master. Werner v. Trautwein, 608.

10. Where a boy of 16 years was employed to do certain work near a cotton gin, which work was not dangerous in character, and at a time when he was unoccupied a fellow servant, without the knowledge of the master or authority to do so, called the boy, without warning him of the danger, to assist in cleaning a gin stand then in operation, a service not belonging to the work assigned to the boy, who was injured by the saws of the gin, the master was not liable therefor, although then in actual control and only a few feet distant from the other parties at the time. Id.

Measure of Damages. See Conversion, 1; Contract of Sale, 3.

Mental Anguish. See Damages, 7; Negligence, 6; Telegraph Company, 9.

Mining. See Lease.

Minors. See Homestead, 6, 10; Limitations, 9, 10; State School Land, 23.

Minor Heirs. See Judgment, 12.

Misjoinder. See Fire Insurance, 4.

That plaintiff in trespass to try title pleads in the alternative for damages for a fraudulent conversion of the land by defendant in selling it to another, does not constitute a misjoinder of actions. Schneider v. Sellers, 226.

Mortgage. See Evidence, 21; Failure of Consideration; Fire Insurance, 20-22; Independent Executor, 1.

1. A mortgage may secure a debt in a stated sum, recited as evidence by a note for that amount (which, through oversight, was never actually executed), such debt consisting in part of an account then owing, and the remainder being intended to cover advances thereafter to be made to the mortgagor, and the mortgage will create a valid lien although there be no statement therein that any part of the indebtedness is for future advances. Glenn v. Seeler, 523.

2. Parol evidence is admissible to show the true consideration of the mortgage, the intention to secure future advances, and to account for the nonexistence of the note, although the pleadings contain no allegation of fraud or mistake in the execution of the mortgage. Id.

3. Where the property is described in a mortgage as lots 7 and 8 in block 20 of the town of Mount Calm, in Hill County, Texas, as shown by the plat of said town of record in Hillsboro, to which reference is made for a more particular description, this is a sufficiently definite description to authorize a foreclosure. Id.

4. Where the wife joins with the husband in a mortgage of community property and of her separate estate to secure a debt of his, or of the community, she is entitled to have the community property first exhausted before resort can be had to her separate property; and in such a case parties claiming the separate property through a conveyance from the wife have ground for relief against the mortgage incumbrance where the creditors secured by it permit the community property to be squandered by the husband's other creditors and otherwise, though notified to foreclosure. Schneider v. Sellers, 226.

5. It seems that where, in a joint mortgage by husband and wife, the wife's separate property, as security for the husband's debt, is included along with community property a notice by the husband alone to the mortgagee creditor, requiring him to foreclose his lien, but making no mention in the notice of the interest of the wife, is sufficient to require the creditor to first exhaust the community property before he can resort to the separate property of the wife. Id.

6. The lien of a mortgage on crops to be raised on premises held by the mortgagor under executory sale, is superior to that created in favor of his vendor as a landlord, by a rescission of the sale and conversion of his holding into a tenancy, made after the crops were growing and the mortgage had attached to them. League v. Sanger Bros., 347.

7. A mortgagee who has the right under his contract to take possession of the mortgaged property on default in payment of the debt secured, can not be held liable for damages by taking such property by writ of sequestration, though it be alleged that the writ was wrongfully procured, on false affidavit, and for the purpose of injuring the mortgagor, since he has done no more by the writ than his contract gave him the right to do without it. Wedig v. Association, 158.

Motion. See Sheriff.

Municipal Corporation. See Cities; Towns.

1. A municipal corporation which succeeds another and embraces substantially the same territorial body of inhabitants becomes, by operation of law, responsible for the debts, such as sewerage bonds, of its predecessor, although such predecessor was only a de facto corporation, and was abolished by judicial decree because of the irregular manner of its organization.

2. Since the Constitution (article 5, section 18) limits the powers of the commissioners court to county business, article 616 of the Revised Statutes, empowering it to levy and collect taxes to settle the indebtedness of a municipal corporation which has been abolished, is invalid. Following Electric Light Company v. Kenan, 88 Texas, 197. Id.

3. A municipal corporation undertaking by the establishment of waterworks, or through other means, to prevent the destruction by fire of the property of its inhabitants, is not liable to them for the burning of such property in consequence of its failure, or that of any agency employed by it, to accomplish that result. Lenzen v. City of New Braunfels, 13 Texas Civil Appeals, 335, not followed. Butterworth v. Henrietta, 467.

4. Where the attempt of a town council to accept the act of 1875 and thereby become incorporated as a city of over 1000 inhabitants was insufficient in manner, and therefore illegal, as also its subsequent action in annexing additional territory, these things were validated by the Acts of 1891 and 1893 contained in article 386, Revised Statutes, and thereafter the right of the city to collect its taxes could not be defeated because of such irregularities. McMickle v. Hardin, 222.

Mutual Benefit Insurance. See Life Insurance, 1.

1. The entry of a fine against a member by the secretary of a benevolent association, without notice, will not affect his financial standing so as to work a forfeiture of his benefit death certificate by placing him in arrears, where neither the constitution nor the by-laws clothed the officer with such power. Association v. O'Donohoe, 254.

2. Where the constitution of a benevolent association provided that on a certain day of each year all members should join in a labor day parade, and that any member failing to so attend should be fined $2.50, such provision was not mandatory and self-executing in the sense that the mere fact of absence from parade had the effect to make the sum a charge against the member. Id.

3. Where plaintiff sued for an amount due under a benefit certificate in the event he should become disabled to "perform or direct any and all kinds of labor," it was not error of which defendant could complain for the court to submit the issue as being whether plaintiff had become disabled to perform and direct any and all kinds of labor, since this required both where either would have sufficed. Supreme Tent v. Cox, 366.

4. Where, under the benefit certificate sued on, plaintiff was entitled to receive annually one-tenth of the amount named in the certificate, he could recover only the amount of the installments due at the time of the trial, and a judgment for the entire amount and providing that execution might issue annually thereafter for the remaining installments, was error. Id.

Negligence. See Contributory Negligence; Landlord and Tenant, 5; Municipal Corporations, 3; Railway Company, 1, 3, 4, 9, 10, 12, 13.

1. Where cotton was shipped on an interstate bill of lading which excepted the carrier from liability for loss by fire except from negligence, and provided that the burden of proof of such negligence should be on the shipper, such provisions were met by evidence showing that the fire was communicated to the cotton by sparks from the engine, and a recovery for its loss was warranted unless defendant showed not only a proper equipment with spark arresters, but also a proper handling of the engine. Fire Assn. v. Loeb, 24.

2. In an action for personal injuries there can be no recovery because of matters of negligence on defendant's part where an intervening act as to which defendant was not negligent was the proximate cause of the injury. See findings upon special issues, such as required a judgment for the defendant, and that related to a case where a miner, working at the bottom of a coal shaft upon a

Negligence—continued.

defective cage, was injured by reason of an accidental and untimely hoisting of the cage, as to which there was no negligence. Roe v. Thomason, 67.

3. An instruction to the effect that if deceased, a brakeman in defendant's employ, was advised by the book of rules furnished him at the time he was employed that it was dangerous to stand erect on the top of cars while passing through a certain bridge, he assumed the risk of injury, and if killed by reason of so doing, his parents could not recover, was properly refused, because it took from the jury the issue as to whether such warning was adequate. Railway v. Knox, 450.

4. It being negligence for the railway company to construct bridges dangerous to the lives of its employes, and provide no contrivance to give warning of them to brakemen on approaching trains, it can not excuse itself by simply showing that the brakeman knew, before receiving the injury, that the bridge was so low he could not pass it with safety while standing on top of the cars. Id.

5. Where plaintiff sues for injury to his storehouse caused by an explosion of from thirty-five to forty-five pounds of dynamite kept by defendant, a hardware merchant, in an adjoining building, it was error to exclude evidence as to the general custom and usuage in regard to keeping dynamite in hardware stores, and the amount ordinarily kept, the issue being as to want of due care; but evidence as to how particular persons conducted their hardware business in this respect was not competent. Barnes v. Zettlemoyer, 468.

6. The interests of another will not deprive the owner of property of its ordinary and reasonable use, and to create liability for injury resulting from such use negligence must be shown. Id.

7. See evidence held sufficient to show that an injury to a freight conductor, caused by the top round of a ladder on the side of a car giving way, was due to negligence of the company in failing to have the car properly inspected. Railway v. Miller, 460.

8. It was competent for plaintiff, suing for injuries that resulted from a failure of defendant to have its cars properly inspected, to show that defendant formerly had car inspectors at the point where the injury occurred, but had none there at the time of the accident, as this tended to prove the want of due car on defendant's part as to the inspecton of its cars. Id.

9. In an action of damages for serious personal injuries, permanent in character, it is competent for plaintiff to testify to his mental suffering in contemplating his changed and crippled condition and reflecting that he must continue to be laid up and suffer the balance of his life, this being a natural result of such injuries. Id.

New Trial. See Practice on Appeal, 2.

1. Under the statute requiring motions for new trial to be determined at the term at which they are filed, the district court is without authority to continue such a motion to a subsequent term, and its order in so doing is void, although the postponment is by the court of its own motion, and over the protest of the moving party. Rev. Stats., art. 1374. Luther v. Telegraph Co., 31.

2. A motion for a new trial and application to the equity jurisdiction of the court, filed after the term of court at which judgment was rendered, is properly overruled where it sets up no defense except the incapacity of plaintiff to maintain the suit, which defense was asserted on the trial, considered and passed upon, and judgment rendered adverse to defendants, to which judgment they duly excepted and gave notice of appeal. Id.

3. Where on a motion for new trial on account of bias of certain jurors, the evidence was conflicting, the trial court's action in denying the motion will not be reviewed. Moody v. Hahn, 474.

4. Where there is not a legal measure of damages, or they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not, although it may think the verdict to be for considerably more or less than it ought to have been, interfere with it, unless the amount allowed is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake. McCormick v. Railway, 321.

5. A new trial should not be granted for newly discovered evidence which is not calculated to change the result. Standlee v. Railway, 340.

Next Friend. See Limitations, 9.

Notarial Record. See Deed, 2.

Notice. See County Bonds, 2; Deed, 1; Fire Insurance, 1; Homestead, 4; Life Insurance, 4; Sheriff, 1.

Notes. See Promissory Notes.

Nuisance.

See evidence as to the explosive character of dynamite upon which the court declines to hold that the keeping of thirty-five to forty-five pounds of it by hardware merchants is, in itself, a nuisance, as being a constant menace to property in that vicinity. Barnes v. Zettlemoyer, 468.

Opinion. See Evidence, 2; Expert Evidence.

Opinion evidence is not admissible as to the safety of an act where its character is determinable, not from expert skill, but from ordinary experience, as in the case of one driving over a railway track at a place other than the planked crossing. Locke v. Railway, 145.

Ordinary Care. See Carrier of Passengers, 2; Telegraph Company, 13.

Parol Agreement. See Fire Insurance, 9.

Parol Evidence. See Evidence, 19; Execution, 7; Fire Insurance, 15; Landlord and Tenant, 3; Usury, 3.

1. The rule that the terms of a written instrument can not be varied by parol evidence does not apply where it is charged that such instrument is simulated and fraudulent. Investment Co. v. Barclay, 543.
2. Upon proof of the loss of a petition for the incorporation of a town, parol evidence is admissible to prove, as part of its contents, the boundaries therein shown. Judd v. State, 418.

Partial Payment. See Life Insurance, 11.

Parties. See Appeal, 1; Jury, 2; Sheriff, 4.

Partition. See Pleading, 1.

In a partition of land a tract set aside to defendant as his homestead, which is not asked to be partitioned and is adjudged not subject to partition, is snfficiently described as the house and lot on which he was residing at the death of his wife. Griffin v. McKinney, 433.

Partner. See Execution, 1; Receiver, 1.

Partnership.

1. In order for an implied power to exist in a partner to bind the firm by partnership notes for borrowed money, the business must be of a character which makes frequent resort to borrowing a necessity not existing by reason of embarrassment or the happening of some fortuitous event, but for the advantageous prosecution of even a prosperous business. Masterson v. Mansfield, 262.
2. Where a partner undertakes to bind the firm by the issuance of commercial paper, in the absence of express authority or some other fact fixing the firm's liability, the paper must be executed in the firm name, or else in the name commonly used by the firm in transacting its business. Id.

Partnership—continued.

3. For facts held to sustain a finding that no implied power existed in a partner to borrow money on the firm name, see the opinion. Id.

Passenger. See Carrier of Passengers; Railway Company, 12, 13, 14.

Pleading. See Carriers, 3; Independent Executor, 4; Intervention; Life Insurance, 3; Landlord and Tenant, 4; Trespass to Try Title, 5.

1. Where, in partition of community property, the defense is that defendant bought the property with money he had earned in a foreign State, under the laws of which such money was his separate property, he must plead such matters to admit evidence thereof and of the laws of such foreign State. Griffin v. McKinney, 432.

2. Where plaintiffs sued in trespass to try title and for an injunction to restrain a judgment under which the land had been sold, a complaint against the judgment rendered therein in plaintiff's favor, on the ground that their petition for injunction was not sworn to, is not well taken where the case was finally tried on an amended petition and no exception appears to have been made to the original pleadings (upon which a temporary injunction had issued) because not sworn to. Johnson v. Daniel, 587.

3. A trial amendment is proeprly allowed which simply alleges the breach of the contract declared on in the original petition, and avers as damages for such breach the highest sum recoverable under the contract. Supreme Tent v. Cox, 366.

4. Where plaintiff sued upon a benefit certificate upon the ground that he had become totally and permanently disabled, a trial amendment alleging that on account of plaintiff's mental disability he should recover, did not set up a new cause of action. Id.

5. A general allegation that articles were of a named value is sufficient to permit proof that they had no market value and evidence of their intrinsic value. Railway v. Davidson, 135.

6. Where a plea of intervention by a trustee in bankruptcy failed to allege that the bankrupt had been adjudged such, the defect was obviated by an averment of such matter in defendant's answer although a demurrer by plaintiff (appellee) to that allegation of the answer had been sustained. Jones v. Drug Co., 234.

7. An allegation by a trustee in bankruptcy that he was duly appointed trustee by the referee is equivalent to a declaration that the circumstances existed which empowered the refree to make the appointment. Id.

Plea in Abatement.

1. A plea in abatement and demurrer asserting defendant's privilege to be sued in another county are waived when not presented at the first term of court, and no reason is shown for such failure. Parlin v. Miller, 190.

2. In an action on a note secured by a chattel mortgage, parties who have, with notice, converted and disposed of the mortgaged property and rendered it inaccessible, may be joined as for conversion, although a foreclosure of the mortgage be impracticable. Id.

3. Where plaintiff is entitled to sue both the principal and agent for a tort, he may sue both or either, and can not be required to elect which one he will proceed against. Id.

4. A plea in abatement alleging that plaintiff fraudulently stated his claim in the amount for which he sues for the purpose of conferring jurisdiction on the court, is waived where defendant permits three terms of court to pass without calling attention to the plea. Rev. Stats., art. 1269. Watson v. Mirike, 527.

Plea of Privilege.

1. Defendant, being sued out of the county of his residence, filed with his answer a plea to the jurisdiction, asserting his privilege to be sued in his own county. His attorney, over the telephone, asked plaintiff's attorney to have the case set for a day certain of the appearance term, and the latter stated that he would insist upon this as a waiver of the plea, and defendant's attorney said

Plea of Privilege—continued.

he would not agree to waive his plea. Plaintiff's attorney then, in accordance with this conversation, had the court to enter an order setting the case for a day certain "by request of defendant's attorney." Held, that there was no waiver of the plea of privilege. Bennett v. Stratton, 510.

2. Plaintiffs sued in the county where the land lay for recovery thereof, with an alternative plea in tort for damages for a fraudulent conversion of the land by certain of the defendants, residing in another county, who, as against such claim for damages, pleaded their right to be sued in the county of their residence, but did not negative the fact that the conversion, or fraudulent sale of the land by them, was made in the county where suit was brought. Held, that the plea of privilege was properly overruled. Schneider v. Sellers, 226.

Possession. See Trespass to Try Title, 2, 3.

Power of Attorney. See Judgment, 4.

Practice on Appeal. See Amendment, 2; Briefs; Assignment of Error; Damages, 1, 3; Variance.

1. Where defendant's motion for new trial to permit him to introduce the laws of a foreign State (which he was unable to adduce at the trial) shows that such laws had been obtained, the refusal of the motion will not be held error where the laws so relied on are not shown in the record on appeal, so that it can be determined whether or not they sustain defendant's contention. Griffin v. McKinney, 432.

2. The rule requiring that an objection questioning the sufficiency of evidence must be brought to the attention of the trial court in a motion for new trial, is not applicable where the trial is had before the court without a jury. Id.

3. Whether or not there is any evidence on an issuance is a question of law, and not of fact, as to which the finding of the Court of Civil Appeals is not binding on the Supreme Court. Masterson v. Mansfield, 262.

4. Where there is no statement subjoined to appellant's proposition under a given assignment of error, such assignment will not be considered. Supreme Tent v. Cox, 366.

5. The propositions, or assignments of error submitted as propositions, in an appellant's brief, should each present a single idea, a distinct ground for reversal, and be supported by a statement giving not argumentive deductions, but copies of the charge complained of or other matter in the record, or at least its substance. See propositions and statements held insufficient. Cage v. Tucker, 48.

Practice in Trial Court. See Harmless Error, 1; Trial.

1. Since it is within the discretion of the trial court to allow a party to withdraw his announcement of readiness for trial for the purpose of filing an amendment, the action of the court in refusing such permission will not be reviewed on appeal. Griffin v. McKinney, 432.

2. Where the jury, upon special issues submitted, found the value of the property in a certain sum, and the court, in rendering judgment, found it at a different sum, there was error in the judgment. Miller v. Balfour, 413.

3. It is an abuse of the statute authorizing the submission of special issues to the jury for the court to submit fifty questions to be answered, since the law does not contemplate that the jury shall find every material fact in evidence, but only upon the substantial and material issues that arise on the facts. Insurance Co. v. Post, 428.

Presumption. See Amendment, 2; Execution, 1; Jurisdiction, 3; State School Land, 1.

The presumption of law is that land deeded to a husband after marriage is community property, and one who purchases it on the faith of that presumption, and without notice that it is in fact separate property, is entitled to protection. Schneider v. Sellers, 226.

Principal and Agent. See Parties, 2.

1. Where an insurance broker was applied to by a firm to procure for them a policy upon their property, and he undertook to and did procure it, and in pursuance of the employment paid the premium and policy fee due thereon, he is entitled to recover from the firm the amounts so paid, if they are reasonable. Holmes v. Thomason, 389.

2. The delivery of the policy to the broker, if he was the agent or broker of the firm to procure it, would be a delivery to the firm. Id.

Priority. See Tax Lien, 1.

Probate Court. See Estates of Decedents.

An administrator filed an account, styled his final account, showing a balance of money on hand, which account was approved by the court. He did not ask for a final discharge, and no order to that effect was entered. Afterwards he filed another final account which was contested by the heirs, specifying in their contest objections to items stated in such former account, to which the administrator demurred on the ground that the approval of such account by the court was conclusive as to the items therein. Held, that an appeal would not lie from the order of the court overruling such demurrer, since it was interlocutory and did not finally adjudicate any contested issue between the parties. Rev. Stats., art. 2255. Thomas v. Hawpe, 535.

Probate Sale. See Land Certificate.

Promissory Notes.

1. D. & Son, owners of a series of notes secured by a mortgage, parted with their title to the first four of the notes, before maturity, and the owners sent them to a bank for collection. The makers of the notes arranged with plaintiffs to take them up as they fell due, upon an understanding that the notes were to be kept alive, and that plaintiff would be entitled to the same security that D. & Son had, and the notes, upon payment of the amount due thereon, were assigned to plaintiffs by the bank. Held, that the notes had not been paid, but had been purchased, by plaintiffs, and the rule that, in order to become subrogated to the lien of the mortgage, plaintiffs would have to pay off the whole series of notes, did not apply, and that a judgment foreclosing the mortgage and directing the proceeds to be paid pro rata on the entire series of notes was correct. Dilley v. Freedman, 39.

2. The act of a holder of vendor's lien notes not mature in indorsing them as canceled on his purchase of the property securing them at a trustee's sale under another incumbrance, if construed as declaring them then due for default in payment of interest, as by their terms he might do, had not that effect after such trustee's sale had been set aside by the court, and limitations did not then run till their maturity. Noel v. Clark, 137.

3. A charge is erroneous which states that a negotiable promissory note taken in due course of trade by indorsement before maturity is subject to all the defenses available to the original maker against the original holder when it is taken as collateral security for a pre-existing debt. Bruce v. Bank, 295.

Proximate Cause. See Contributory Negligence, 2; Negligence, 2.

Where a train approached a highway crossing under full headway, without giving any signal or warning, its approach being shut off from the view of parties on the highway by a barn and orchard, and plaintiff's wife, in a buggy, had approached near the crossing without seeing or hearing the train, and her horse becoming frightened at the sudden passage of the train so near him, she sprang to his head to hold him, and was knocked down by him, dragged and otherwise injured, the negligence of the trainmen in failing to blow the whistle or ring the bell was the proximate cause of the injury, and the facts did not show contributory negligence on the part of plaintiff's wife in failing to look or listen. Railway v. Eaves, 409.

Public Lands. See State School Lands.

Public Road.

The commissioners court has not authority to order or permit the digging of wells in a public road, for the purpose of rendering water convenient for travelers, without the consent of the owner of the land to such additional burden thereon, since easement for the purposes of a highway does not include such use of the land. Clutter v. Davis, 532.

Quitclaim. See Dedication, 5.

Railway Company. See Carriers; Charge, 1, 2; Damages, 5, 15; Proximate cause; Negligence, 1, 3, 7.

1. See evidence held to warrant verdict against the railway company for injury to a switchman by derailment of a switch engine through improper setting of the switch, and resulting from negligent failure of the foreman to observe that the handle bar of the switch was not securely fastened in its proper place. Railway v. Powell, 91.

2. Where negligence on the part of the foreman contributes, along with the risk assumed by the servant, in causing the injuries to the servant, the master is liable, as injuries so brought about are not among the assumed risks of the servant's employment. Id.

3. The fact that negligence of a third party concurred with that of the master in causing the servant's injuries, would not confer upon the master a right of action against such third party. Id.

4. A verdict was properly directed in favor of a codefendant company whose track and switch the defendant company was using, where the evidence showed that the derailment of the engine and consequent injury of plaintiff was due to failure of the defendant's employes to properly set the switch, and not to defects in the switch. Id.

5. A railway company was liable for breach of a contract whereby plaintiff was to haul to its depot all freight for shipment over its road originating within certain limits, for a fixed compensation, and can not escape liability for depriving plaintiff of the right to perform the service at the price agreed upon by having it delivered to another road at the initial point and hauled by that road to another point on its line before receiving it, where the person controlling the routing of the shipment designated defendant's and not the other road as the route. Railway v. Dnnison, 127.

6. This case distinguished on the facts from that presented on the former appeal, of Railway v. Dennison, 22 Texas Civil Appeals, 89. Id.

7. A railway company is not excused from liability for overflow of land and destruction of property due to the presence of its embankment by the fact that it proceeded from an extraordinary and unusual rainfall; the rainfall must be unprecedented or it was the company's duty to anticipate and guard against it. Railway v. Davidson, 134.

8. A highway crossing over a railway being obstructed by a hand car, plaintiff, in attempting to drive over the rails on one side of the planked crossing way, was thrown from his wagon and injured through his team taking fright at the car, on which some garments were hung. Held, that he had not assumed the risk as matter of law, and the right to recover if his act were not found to be one of contributory negligence should have been left to the jury. Locke v. Railway, 145.

9. In an action for personal injury to a railroad track repairer, injured by a passing train, it was error for the court to charge that plaintiff should recover if he was injured by the negligence of an acting foreman in not taking proper steps to notify him of passing trains in time to clear the track, where the evidence showed that plaintiff knew that no steps had been taken to warn him and his colaborers of approaching trains, and that he heard the approaching train in time to have cleared the track and escaped the danger. Railway v. Gilstrap, 304.

10. An allegation that plaintiff's injury was caused by the negligence of his foreman in directing his gang to work on the track without making arrangements to notify them of approaching trains in time to clear the track, did not

Railway Company—continued.

warrant a charge that if plaintiff was injured by his foreman's negligence in leaving no one in control of plaintiff and his colaborers during his absence from them, plaintiff could recover. Id.

11. Error in the charge authorizing a recovery by plaintiff, a section hand, can not be held immaterial on the ground that such recovery was warranted by the fact that he was injured in an effort to save life and property by removing a car and timbers from the track—such removal being necessary and plaintiff acting without rashness—where such an issue was not submitted to the jury. Id.

12. The mere fact that a passenger was injured in stepping off a car, none of the attending circumstances going to show negligence, will not authorize a presumption of negligence on the part of the railway company. Railway v. Frey, 386.

13. Where a lady passenger was injured in alighting from a car, and the only negligence alleged was a failure to provide a platform upon which she could alight and to provide a box or stool to aid her in reaching the ground, and the evidence was that there was a cement platform level with the tracks and eighteen inches below the step of the car, and that the passenger received careful assistance in alighting, and there was no proof of defects in the platform, or that it was not the usual and ordinary distance from the step of the car, or that it would have been safer to step on a box or stool, the evidence was not sufficient to authorize a recovery. Id.

14. A passenger train having stopped at a dinner station, with announcement that it would remain there twenty minutes, a lady passenger alighted from it and went across the street to purchase some stamps. As she returned, five minutes later, she saw the train moving forward, and supposing that it was pulling out, she attempted to board it, and just as she did so, the train gave a violent jerk, whereby she was thrown to the ground and injured. She was not seen at the time by any of the train operatives, being on the opposite side from the depot, and the train was being moved up in order to clear a highway crossing there. Held, that there was such negligence as authorized a recovery by the passenger for the injuries so received, since the train operatives ought to have foreseen, at the time of the jerk, that some passenger might be then about to enter the train. Railway v. Humphreys, 401.

15. Where a traveler is signaled by a railroad flagman to cross the track, he has the right to presume that it is safe to cross, and is not bound to exercise the same degree of care as where no such signal had been given, but is required to use only such care as would a reasonably prudent man under the circumstances. Railway v. Ray, 567.

16. Where a traveler approaching a railroad track is signaled by the flagman there to cross, and upon doing so is nearly struck by the sudden starting up with considerable noise of an engine near there causing his horse to take fright and run away, and himself to be thrown from the buggy and injured, he is entitled to recover from the railway company therefor. Id.

17. Where plaintiff had driven up near a railroad crossing, and a brakeman on a train which had just cleared the crossing and stopped, signaled plaintiff to cross over, plaintiff was warranted in relying on such invitation and attempting then to cross. See opinion for allegations held sufficiently full to show liability on the part of the railway company in such case. Railway v. Stonecypher, 569.

18. Where a yardmaster has power to discharge any and all employes within the yards, he is, so far as concerns the proper discharge of such duties, a vice-principal of the railroad company. Railway v. Eckles, 176.

Receiver. See Judgment, 13.

1. After verdict and pending an appeal in an action to subject the interest of a partner in firm property to his debts,—he being insolvent, in possession and management of the property, but likely to misappropriate it,—the court may, under Revised Statutes, article 1465, appoint a receiver to carry out the provisions of the judgment directing a sale of the property, although the other partner is solvent and able to respond in damages, should he waste or misappropriate the property pending the appeal. Jones v. Drug Co., 234.

2. This case distinguished from Bank v. Dunham, 18 Texas Civil Appeals, 184, upon the point as to when the appointment of a receiver is authorized. Id.

Receiver—continued.

3. One who has recovered judgment with foreclosure upon the interests of defendants in property held by the receiver of a company of which they were part owners, may by intervention in the receivership case follow such property in the receiver's hands and have the question as to his superior right to it passed upon. Eck v. Warner, 338.

Receiver's Sale. See Corporation.

Registration. See Deed, 1.

Remarks of Counsel. See Argument of Counsel.

Defendant having offered in evidence a written lease executed by it to another corporation, counsel for plaintiff, objecting to its introduction, stated in the hearing of the jury that it was a self-serving document prepared for use in this case, and for the purpose of denying the relation of principal and agent between the two corporations. The court admitted the instrument in evidence, and defendants did not request any charge to have the jury disregard the remarks, and nothing in the record shows that the jury were influenced thereby. Held, that the remarks did not constitute reversible error. Investment Co. v. Barclay, 543.

Remittitur. See Damages, 1.

Rent. See Homestead, 11.

1. Where plaintiff sues for rent payable in products, the measure of damages is the market value of such products at the time the rent accrued, with interest to the time of trial. Watson v. Mirike, 527.

2. Where the proof showed that a part of the debt alleged to be due by the landlord in his application for the distress warrant was in fact due and a part was not due, the tenant was not entitled to damages because the entire crop was distrained, since the landlord was entitled to levy upon all the property covered by his lien, but only to such damages as he actually sustained by reason of the wrongful averment in the application of a greater amount due than was actually due at that time. Following McKee v. Sims, 92 Texas, 51. Watson v. Boswell, 379.

Repudiation. See Limitations, 4.

Reputation. See Damages, 14; Evidence, 8.

Rescission.

1. In an action to rescind, in the alternative, a contract by which plaintiff purchased certain mill machinery under a warranty that it would work well, a demurrer by the defendant to certain items of damage charged in the petition as the cost of drayage and of placing the machinery in position was properly overruled, since there might have been shown a state of facts that would have authorized a recovery of those items. Miller v. Balfour, 413.

2. Where, however, on the trial a rescission of the contract was denied, no fraud on defendant's part being shown, and plaintiff recovered the difference between the cost price of the machinery and its actual value as affected by certain defects, it was error to further allow plaintiff the items of drayage and cost of placing the machinery in position, since these items must have been incurred by the purchaser in any event. See facts under which a rescission was properly denied. Id.

Res Judicata. See Judgment by Default.

1. Where defendants filed a plea to the jurisdiction over their persons, which plea was sustained and the suit dismissed, and in a second suit on the same

Res Judicata—continued.

subject matter brought against them by plaintiffs, defendants again filed a plea of personal privilege, and also a plea setting up such former judgment of dismissal in bar of plaintiffs' right to sue again in that county, it was error for the court to hold such judgment to be res judicata upon the question of jurisdiction raised by the plea of personal privilege in the second suit. Ellison v. Yates, 41.

2. A Judgment against the holder of vendor's lien notes, who had plead them as a defense to an action by the payor to recover the land, but had not asked judgment on them, was no bar to a subsequent suit by him to recover on the notes and foreclose the lien. Noel v. Clark, 136.

Revised Statutes. See Towns.

Sale. See Execution Sale; Judicial Sale; Contract of Sale.

If a vendor of personal property can ever, in this State, maintain an action for the purchase price against a purchaser who refuses to receive the goods and carry out the contract, it can only be upon tender of the specific property unincumbered by any lien, or waiver of such tender. Keppert v. Aultman, 495.

Secondary Evidence. See Evidence, 23; Will, 3.

Security. See Promissory Note, 1; Surety.

Separate Estate. See Wife's Separate Property; Community Property, 1; Married Woman, 4.

Sequestration. See Mortgage, 1.

Setoff. See Garnishment, 2.

Sheriff.

1. Where a pleading in nature of a motion to recover against a sheriff the amount of a judgment which he has wrongfully failed to make on execution was filed in the court from which and entitled in the cause in which execution issued, his written acceptance of service in such cause was equivalent to a waiver of the notice of such motion required by article 2386, Revised Statutes. Murray v. Evans, 331.

2. The statute requiring five days notice of the motion against a sheriff was met and judgment by default warranted where his waiver of notice was signed by him twelve days, though filed in the case only three days, before the judgment. Id.

3. The proceeding by motion against a sheriff under article 2386, Revised Statutes, differs from an ordinary action only in some matters of form, is not penal in its nature, nor so summary as to require the allegations of the motion to be strictly construed. See opinion for motion held, under this rule, good on general demurrer and sufficient to admit evidence. Id.

4. The sureties on the sheriff's official bond are not necessary parties to a motion for judgment against him for failing to levy an execution. Id.

Special Issues. See Practice in Trial Court, 2, 3.

1. Where the court submitted to the jury as one of the issues, the question whether a certain corporation was organized in good faith to be a distinct and separate corporation from a named investment company, and was at a given time in good faith running and operating a certain hotel as an independent corporation and bona fide lessee of the investment company, for and in its own behalf and interest, and not for and in behalf of the investment company, and the jury answered that such corporation was not organized in good faith and was not at the time named running the hotel in its own behalf "but was acting

Special Issues—continued.

as agent for the investment company," such answer was responsive and proper, as the interrogatories submitted the question of agency, and such answer was not, as to the matter of agency, a conclusion of law. Investment Co. v. Barclay, 543.

2. Where the one issue of negligence on the part of defendant was submitted to the jury by six interrogatories, and they answered four of them in plaintiff's favor and two in defendant's favor, such answers conflicting with each other, such a return of verdict was not responsive to the issues, and it was proper for the court to call the jury's attention thereto and to send them back for further deliberation. Id.

Statement of Facts. See Mandamus.

An agreed statement of facts will be considered only with reference to the parties agreeing to it. Schneider v. Stephens, 60 Texas, 419, distinguished. Bruce v. Bank, 295.

State School Land. See Survey, 1.

1. Where it appears from the statement of facts that the State school lands in controversy were reclassified and appraised, the dates thereof and the prices fixed being recited, it will be presumed in favor of the judgment that the reclassifications and appraisements were duly made by the proper authority, and objection to the effect that there had been no legal reclassification or appraisement and application to purchase in conformity thereto, unsupported by evidence in the bills of exception, or otherwise, can not be sustained. Clarke v. McKnight, 60.

2. Improvements placed on State school land by a purchaser of such character as to become fixtures will pass to the State on a legal forfeiture of the contract of purchase. Id.

3. Where one asserting right to State school land under a lease seeks, under Revised Statutes, article 4218s, to avoid a subsequent sale of the land by the State on the ground that he owned improvements on the land worth more than $200, and that he had bought such improvements from prior owner, whose contract of purchase with the State had been forfeited, it developed on him to show the extent and value of such improvements, and that they were in the nature of personalty. Id.

4. One who shows himself to be a purchaser of and actual settler upon a section of State school land, and a fair and regular purchase by himself from the State of an additional section of grazing lands situated within a radius of five miles of his home section, after due classification and appraisement thereof, is entitled to recover such additional sections from one claiming under a lease thereof who fails to show that he had placed or acquired improvements thereon of the value of $200. Id.

5. An offer of $1.50 per acre for a tract of State school land appraised at $2 per acre is insufficient, and does not authorize an award of the land by the General Land Commissioner. Bowerman v. Pope, 79.

6. Where the Commissioner of the General Land Office approved a reappraisement at $1 per acre of all State school lands in a certain county "which appeared on the market," this did not constitute a reappraisement of a section of such land, a sale of which had been awarded by the Commissioner two days before, although such sale proved invalid because of defects in the application to purchase. Id.

7. An application to purchase, at $1.50 per acre, school land which had been appraised at $2 per acre, is not made valid by the fact that it appeared on the books of the General Land Office without appraisement, and that it was "understood" that lands which were unappraised was on the market at $1.50 per acre, the minimum price fixed in the statute for land of that class. Id.

8. Where, in a contest as to priority of right in the purchase of State school lands, there was an issue, with conflicting evidence, as to whether the date of plaintiff's application (the older one in point of time) was a forgery or not, it was error for the court to peremptorily instruct a verdict for defendant, instead of submitting that issue to the jury. Id.

State School Land—continued.

9. Where the evidence showed that plaintiff and defendant, who had been contesting applicants for the purchase of certain State school lands, were both young unmarried men, each having a place of abode elsewhere, and that neither made any very substantial improvements, or remained any considerable time on the lands, or otherwise exhibited an unmistakable purpose to establish a home there, the issue of actual, bona fide settlement should have been submitted to the jury, instead of a peremptory instruction to find for defendant. Wyatt v. Lyons, 88.

10. Where, in such case, the evidence tended to show that the purchase of school land made by one of the litigating applicants was made in collusion with a third person and for the latter's benefit, in violation of the statute, and the question of collusion vel non turned on such applicant's good faith in making an agreement to lease the land to the third party, the issue of collusion was for the jury, as a phase of the issue of good faith and bona fide settlement. Id.

11. The issue of good faith and collusion being for the jury, it was error for the court to permit a witness to testify that one T., with whom it was charged plaintiff was acting in collusion, had told him, plaintiff not being present, that he, said T., had to get plaintiff to file on the land to keep others from getting it. Id.

12. Even if an assignment of error as to the admission of evidence must be disregarded because grouped in the brief with other assignments complaining of the court's action in directing a verdict, this would not preclude consideration of the latter assignments. Id.

13. See evidence of facts held not to constitute an actual settlement upon State school land, but to show merely an intention to settle thereafter. Jones v. Bourbonnais, 94.

14. It is actual settlement in fact that fixes the status of an eligible purchaser of additional State school land, and a good excuse for failure to make such settlement will not suffice in lieu thereof. Rev. Stats., arts. 4218f, 4218i. Id.

15. Where additional State school land was purchased under article 4218f of the Revised Statutes as amended by the Laws of 1897, page 184, it was a sufficient actual settlement to comply with the Act of May 27, 1899, as to such additional land, that the purchaser settled on his home section within six months from the filing of his application therefor. Dabbs v. Rothe, 201.

16. The provision in the curative Act of May 27, 1899, cutting off the right of a subsequent purchaser of school land from the State unless he brought suit within six months from the date of that act, does not apply where the first purchaser does not come within the class to whom relief was granted by that statute, viz., those who were not actual settlers on the land at the time of their application to buy; and hence, in a contest to title between a purchaser under the law of 1897 and a subsequent purchaser from the State it was necessary, in order to justify a peremptory instruction to the jury to find for the first purchaser on the ground that the second had not filed his suit within six months after the Act of 1899 took effect, that the testimony should show an undisputed case of failure on the part of the first purchaser to settle on his home tract before he applied to purchase the additional land, but that he did settle on one or the other within six months after he made his application to purchase. Id.

17. The Act of May 27, 1899, is not retroactive, and does not deprive anyone of vested rights. Id.

18. The Supreme Court having answered in the negative a certified question in this case whether a married woman who had purchased school land from the State and occupied it as an actual settler for five years had lost her right to the land by virtue of certain acts relative to keeping the interest due thereon to the State paid up, the judgment of the trial court in favor of a subsequent applicant to lease the land from the State is reversed, and judgment is rendered sustaining the married woman's title, which had been erroneously marked "forfeited" by the Commissioner of the General Land Office. Anderson v. Neighbors, 504.

19. The terms of the statute authorizing a sale of State school lands to "any person" are broad enough to include a sale to a married woman, whose right to acquire and hold property in Texas is as absolute as that of her husband. Id.

20. Under the statutes governing a sale of State school land made to an actual settler in 1897 and providing for a forfeiture of the sale in case of nonpayment

State School Land—continued.

of interest due thereon or nonoccupancy of the land, no forfeiture takes place, though there be such default by the purchaser, until the Land Commissioner makes in his office the indorsement of "Land forfeited," as required by the statute; and until this be done, the land can not be again purchased from the State by another, Sayles' Civ. Stats., arts. 4218l, 4218j. Bank v. Dowlearn, 59 Southwestern Reporter, 308, disapproved. O'Keefe v. McPherson, 313.

21. Even if such forfeiture was duly indorsed and declared by the Land Commissioner, the land would not be subject to sale again until he had listed it with the county clerk or otherwise placed it on the market under some proper regulation. Id.

22. A sale of the land to a minor, made by the original purchaser before his contract is fulfilled with the State, can not, even if it be assumed that such sale to the minor is void, work an abandonment of the purchase such as will, of itself alone, authorize the Land Commissioner to resell the land to another, and without taking any of the steps requisite to placing it again on the market. Id.

23. While considering it not necessary to the disposition of this case to decide whether a sale of State school land to a minor, over 18 years old and an actual settler, is void or not, the court deems it proper to say that it is disposed to adhere to its ruling in Weatherford v. McFadden, 21 Texas Civil Appeals, 260, upholding the validity of such a sale, as such ruling is not necessarily in conflict with Walker v. Rogan, 93 Texas, 248. Id.

24. See the opinion for evidence held sufficient to warrant a finding that one who had purchased school land as an actual settler thereon had duly established his residence in a certain dugout in the belief that it was on the tract, and that this belief was well founded—although the evidence strongly tended to show that it was in fact across the line on an adjoining tract. Moody v. Hahn, 474.

Stenographer. See Costs, 1.

Subrogation. See Fire Insurance, 21.

Where parties purchasing land under a foreclosure of their mortgage lien thereon, in order to protect their title pay off another lien on the land superior to their own, they are not mere volunteers in making such payment, and are entitled to be subrogated to the rights of the holder of the lien so discharged. Schneider v. Sellers, 226.

Survey. See Failure of Consideration; Sheriff.

1. While the law requires the survey of a railroad land certificate and the alternate survey of a like amount for the State to be contiguous to each other, yet if made apart, they are not void, but only irregular. Barrow v. Gridley, 13.

2. Where a survey was made so as to cover an excess of land, and afterwards another certificate was located in part on the tract, such second location was upon appropriated land, and was subject to a correction of the prior survey such as fixed it on that part of the land covered by the second location. Id.

Surprise. See Continuance.

Taxation. See Franchise Tax; Injunction; Municipal Corporation, 2.

Tax Lien. See Injunction; Jurisdiction, 3.

When article 5175a of the Revised Statutes is construed in connection with other articles of the statutes relating to the same subject matter, it does not have the effect to exempt property set apart in lieu of an allowance for the homestead from the lien for taxes due thereon. State v. Jordan, 17.

Telegraph Company.

1. In an action for the nondelivery of a telegram announcing that plaintiff's son was dying, it was competent for plaintiff to testify that had it been delivered

Telegraph Company—continued.

he would have understood it correctly, although the son's first name was wrongly given therein, and that he would have gone to the son, and would have wired back for the body to be held awaiting his arrival, and to show by another that the body would have been so held. Telegraph Co. v. Morris, 43.

2. In an unrepeated message the name of the addressee was changed in transmission from "Norris" to "Nortys." The contract by virtue of which it was sent provided that the defendant company should not be responsible for any errors in its transmission. No evidence was offered at the trial showing how or why the mistake of name occurred in the transmission, and defendant requested a charge, in effect, that by virtue of such contract it was not liable for the error. Held, that the charge was properly refused, since the company, as a common carrier of messages, could not contract against exemption from liability for its own negligence, and such change of name of the addressee presented a prima facie case of negligence. Id.

3. Plaintiff sued for damages for delay in delivering a message announcing the serious illness of his brother, whereby he was prevented from being at the funeral. Had he taken the first train after receiving the delayed message, he would still have arrived in time for the funeral, but he failed to take such first train because of his son's sickness, the condition of his business, and other circumstances. See the opinion for facts held to warrant the court in refusing to direct a verdict for the defendant, and in submitting to the jury the issue as to whether there was a sufficient excuse for plaintiff's failure to act promptly in starting. Telegraph Co. v. Bryson, 74.

4. In submitting the issue as to whether there was a sufficient excuse shown for plaintiff's failure to take the first train, the court charged the jury: "If you believe from the evidence that a reasonably diligent and prudent man, possessed of the same information that plaintiff had, and similarly situated and circumstanced as plaintiff was, as shown from all of the evidence before you, would have started to his brother on the train that passed C. at 2:30 o'clock of that day, then the plaintiff will be precluded from a recovery." Held, that the charge was all that was required. Id.

5. The court properly refused to charge that defendant was not liable if, by a reasonable expenditure of money, plaintiff could have lessened or prevented the injury, since plaintiff's excuse for delay involved more than an expenditure of money. Id.

6. Evidence that the telegraph office was kept open until 12 o'clock at night, and no regular office hours had been fixed, though it was the usual custom to keep such office open from 8 a. m. to 6 p. m., authorized the submission to the jury of the question as to what were defendant's office hours. Id.

7. Where the appellant company requested a charge exonerating it from liability if the message was received after its reasonable office hours, it can not object to the submission to the jury of the question whether such office hours were reasonable. Id.

8. An assignment of error to the sufficiency of the evidence will not be considered where it relates to diverse issues which are grouped in the assignment, and no one of them is separately briefed. Id.

9. Damages for mental suffering resulting from the nondelivery of a telegram sent from one point in Arkansas to another point in that State can not be recovered in a Texas court by reason of the mere residence of plaintiff in Texas, since mental distress is not recognized as an element of damage by the law of Arkansas, and the right of recovery is governed by the law of the place where the contract was made and the injury occurred, and not by the law of the forum. Thomas v. Telegraph Co., 398.

10. The rule is not changed by the fact that at the city of Texarkana, where the message was sent, and which city is about equally divided by the State line between Arkansas and Texas, the telegraph company has no office except on the Arkansas side, there being no statute requiring that the company have any office at that point on the Texas side. Id.

11. Nor does the fact that plaintiff, after the failure to deliver the telegram, with its consequent disappointment and mental distress, returned from Arkansas to Texas, and there continued to suffer much distress, alter the case so as to give him a right of action in Texas. Id.

Telegraph Company—continued.

12. Where a telegraph company has for many years maintained an office at New Waverly, but on its printed list of offices kept for the guidance of its operators the town was put down by the name of Waverly, and a message was tendered directed to New Waverly, which the operator declined to receive, not knowing that the company had an office at New Waverly, the telegraph company was liable for the damages resulting from such failure to receive and transmit the message. Telegraph Co. v. Downs, 597.

13. It is want of ordinary care for a telegraph company to adopt an arbitrary name for one of its offices differing from the actual name of the town in which it is located, and to furnish its agents only with such arbitrary name to guide them in determining what messages to accept. Id.

14. Where a telegraph operator had refused to receive and forward a message announcing to a party the serious illness of his mother, the failure of the person offering message to then forward it by telephone was not contributory negligence where such person did not know there was telephone connection with the point to which the message was addressed. Id.

Telephone Company. See Eminent Domain.

Tender. See Corporation, 2; Sale.

Where plaintiffs, seeking to have an execution sale of land set aside, tendered into court the amount which defendant had bid for the land, and there was judgment in plaintiffs' favor setting aside the sale, and in defendant's favor for the amount of such bid, it was not a tenable objection to the judgment in favor of plaintiffs that the amount of the bid should have been left in the custody of the clerk, defendant being awarded execution therefor and it not appearing the plaintiffs were insolvent. Johnson v. Daniel, 587.

Tort. See Parties, 2.

Transfer of Cause. See Jurisdiction, 1.

Towns.

1. Where the incorporation of a town was invalid because 75 to 80 per cent of the territory included was agricultural and pastoral land, such invalidity was not cured by article 616c, Revised Statutes, since that article has no application to incorporations in violation of law, but only to such as were defective because of a failure to comply with all the requirements of the law; nor could such invalidity be cured by an order of the commissioners court changing and making smaller the boundaries, since that court had no jurisdiction in the matter. Judd v. State, 418.

2. Nor was such invalidity cured by the Act of 1893, page 175, relating to the incorporation of towns for school purposes, since that act has no application to general municipal corporations, and if intended to have such application, it is obnoxious to the provision of the Constitution (section 35, article 3) prohibiting the inclusion of more than one subject in the same bill. Id.

3. The invalidity of an act of the Legislature resulting from its violation of the provision of the Constitution prohibiting more than one subject in the same bill is not obviated by the subsequent inclusion of the act, with a division of it into two articles, in the codification of the present Revised Statutes, and upon the ground that the adoption of the Revised Statutes was a re-enactment of the law, since the Revised Statutes, by virtue of express provision therein, are to be construed as continuations of the existing law, and not as new enactments of the same. Final Title, sec. 19. Id.

Trespass to Try Title. See Evidence, 16; Execution Sale, 3; Judgment, 11; Marriage, 2.

1. A plaintiff deraigning title from the defendant through a sheriff's sale was not bound to go back of defendant in his proof of title. Frazier v. Assn., 476.

Trespass to Try Title—continued.

2. Plaintiff in trespass to try title, seeking to eject mere intruders, and having failed to show title in himself, can not recover on the strength of a prior possession where the evidence affirmatively shows that such possession was under and by virtue of an unfounded and mistaken claim of title, since the prima facie inference of ownership arising from the possession is rebutted, and no presumption arises that an independent outstanding title had been acquired. Robertson v. Kirby, 472.

3. The statute in reference to improvements on land made by the defendant in good faith and under claim of title does not restrict a recovery for their value to one who claims title to the land by purchase, but applies also in the case of an heir who, ignorant of a prior unrecorded deed by his father, took possession in good faith, after such inquiry and search of the records as an ordinarily prudent person would have made; and his claim is not affected by the fact that he received possession from his mother, who was not a possessor in good faith, his own possession having continued for one year. Rev. Stats., art. 5277. Rowan v. Rainey, 593.

4. The statute making an unrecorded deed of the ancestor binding on the heir is not intended to apply to and cut off a claim for improvements made by an heir in good faith and without notice on land that had been sold by the ancestor. Rev. Stats., art. 4640. Id.

5. In an action of trespass to try title to lands brought against unknown heirs, plaintiff's petition must, under article 1504c, Revised Statutes, set forth plaintiff's title, as well as the claim of defendants, if known, although in other cases of trespass to try title this is not requisite under article 5250, relating generally to that form of action. Cates v. Alston Heirs, 454.

6. Where plaintiff had acquired the legal title to the land in controversy by an exchange therefor of lands in which she had an equitable community interest, she was entitled to offset such equitable interest against an equitable claim of defendant to the land in suit. Hillen v. Williams, 268.

Trial. See Jury.

1. It was not error to try a case upon its appearance day and in the absence of counsel for defendant, it being reached in its order on the call of the appearance docket for trial and the continuance or postponement of the cases preceding it. Ellis v. Mabry, 164.

2. An action for money collected by defendant upon an insurance policy in which plaintiff had an interest was not founded on the policy, and an amendment correcting its description did not set up a new cause of action nor require a new citation to authorize judgment against a defendant who had answered the original petition, upon trial had in his absence. Id.

Trust. See Limitations, 3, 4.

Trustee in Bankruptcy. See Pleadings, 6, 7.

Trust Deed.

1. The holder of a mortgage with power of sale who by ruling on demurrer has been denied foreclosure on the ground that the debt was barred, is not deprived, by his election to foreclose, of his right to proceed by trustee's sale, since he had but one remedy, and no choice; he may still sell through the trustee and by amendment assert title through such sale. Lee v. Mortgage Co., 481.

2. On the recovery of judgment by plaintiff in such amended action it was not error to charge defendant with one-half of the costs incurred prior to the amendment. Id.

Trustee in Bankruptcy.

1. An objection that a trustee in bankruptcy had no right to intervene in the suit without showing that he had obtained leave to do so from the bankruptcy court, comes too late where first made after verdict. Jones v. Drug Co., 234.

Trustee in Bankruptcy—continued.

2. Where a trustee in bankruptcy intervenes in a suit, he is not required to prove his appointment and qualification as such trustee where his right to recover in that capacity is not denied under oath, under Revised Statutes, article 1265. Id.

Usury.

1. Where a judgment debtor agreed to pay 10 per cent interest per annum on all the indebtedness, principal, interest and cost of taking up a judgment against him, and also executed his note for $300 as compensation for advancing money—the expenses and compensation of the loan agent covering but $60 of that amount—the note was usurious and void, except as to such $60. Nesbit v. Goodrich, 28.

2. The judgment, not being itself tainted with usury, was not affected by the subsequent usurious and void contract under which it was purchased and carried for a year, and was therefore still enforcible for its full amount of principal, interest and costs. Id.

3. Parol evidence of antecedent and contemporaneous acts and declarations of the parties is admissible to show that a contract with a building and loan association, fair upon its face, was in fact only a device to cover usury, although such evidence tends to vary and change the written contract. Peightal v. Building Co., 390.

4. The taking by a loan association, in each monthly payment to it, of an insignificant amount of interest in advance of the legal rate, is not usury where this was done for the sake of convenience, in getting an even number of cents, and with the intention of deducting the excess from the last payment. Id.

5. Where the motive or intention actuating a party is the subject of inquiry, a witness may testify what his motive or intention was; and the rule applies where the question of usury is involved. Id.

6. An appellant can not avail himself of errors in rulings on a defense by him of usury, or in allowing foreclosure of a lien, where no personal judgment was given on the notes in suit, and where it was rightly found that he did not own the property for which the notes were given and on which the lien was foreclosed. Bruce v. Bank, 295.

Validating Act. See Municipal Corporation, 4; Towns.

Variance. See Allegation and Proof; Evidence, 16.

1. The rule that an objection that the verdict is contrary to the evidence will be deemed as waived if not called to the attention of the court below in a motion for a new trial applies where the objection is that the proof offered by a party is variant from the allegation in his pleading. Railway v. Ball, 500.

2. Where, in an action for damages against a railway company, plaintiff alleged that his wife was refused permission to ride in the car for white people and forced to ride in the negro coach, and the proof showed only that the train conductor, after having twice promised to do so, failed to assist the wife to change from the colored coach to the one for whites, there was no variance, since the proof was reasonably sufficient to establish the substance of the issue. Id.

3. It does not create a variance that the description of land sued for in the petition contains particulars not embraced in that given by the instruments offered in evidence. Frazier v. Assn., 476.

Vendor and Purchaser. See Boundaries.

Where a purchaser of land put up a forfeit for the performance of the contract on his part, to be returned to him if the title should be found bad, the vendor was not entitled to recover the forfeit of the depositary unless he was in position to furnish a good title and require specific performance, although the purchaser has written him that he could not raise the money to pay for the land and would have to lose the forfeit, and had given the vendor an order for the deposit, which he afterwards countermanded. Tharp v. Lee, 439.

Vendor's Lien. See Homestead, 4, 14; Res Judicata, 2.

The wife's homestead rights did not attach to land conveyed to the husband, as against the holder of a vendor's lien note given on such conveyance, though the transaction was an attempt to mortgage the grantor's homestead under guise of a sale. Noel v. Clark, 136.

Venue. See Change of Venue; Plea of Privilege.

Verdict. See Special Issues.

1. A verdict against a joint defendant, who was liable as for conversion of the mortgaged property, for the sum of $2500, the amount of the note secured by the mortgage, together with interest and attorney's fees, "provided the amount does not exceed $3000" (the value of the mortgaged property), does not deny any recovery at all where such total amount exceeds $3000, but merely limits the recovery to that sum. Parlin v. Miller, 190.

2. Where a case is submitted to the jury on special issues, and no complaint is made in motion for new trial or otherwise in the court below of the verdict, it becomes, under the statute, conclusive as to the facts found. Rev. Stats., art. 1332. Robertson v. Kirby, 472.

3. Where the facts of a case have been submitted to the jury upon special issues, the judgment of the court must conform to the verdict, and is but the legal conclusion arising from the facts found by the jury. Hillen v. Williams, 268.

4. In actions of damage for the death of a person, the amount of the damages is left to the discretion of the jury, and unless such discretion is abused, the appellate court it not warranted in disturbing the verdict. Railway v. Crowder, 536.

Verification. See Account; Pleadings, 2.

Vice Principal. See Railway Company, 18.

Waiver. See Fire Insurance, 7, 10, 11, 14, 16, 18; Plea of Privilege, 1.

Warning. See Negligence, 3, 4.

Warranty. See Rescission.

Waterworks. See Municipal Corporation, 3.

Wife's Separate Property. See Married Woman, 4; Mortgage, 4.

Will.

1. A testatrix duly executed a will, and in connection with it there was offered for probate, as a codicil, a separate paper, signed by her, reciting briefly that she that day gave to her daughter, O. W., her residence place, to have and to hold forever in her own right. This paper was in the handwriting of the testatrix and was acknowledged by her before a notary, and after her death was found in an envelope among her valuable papers, and on the back of the envelope was an indorsement in her handwriting and signed by her, as follows, "For O. W. at or after my death." Held, that the indorsement should be considered in connection with the instrument to which it referred, and so considered the paper was in legal effect a codicil, and not an undelivered deed of gift. Grigsby v. Willis, 1.

2. A recital in a will that one was the adopted daughter of the deceased husband of testatrix, was evidence as against another to whom she devised all her real estate, described as a half interest in specific property which had been community estate, that the husband's community half interest had passed by inheritance to such adopted daughter. White v. Holman, 152.

Will—continued.

3. A recital of the adoption of an heir, in a will introduced without objection, was sufficient evidence of that fact, though the adoption papers might be the best evidence. Id.

4. A husband and afterwards the wife dying without children, the latter devised to her sister "all the land I now own," which "consists of an undivided one-half interest" in land specifically described, which had been community property of herself and the deceased husband; she also bequeathed all her personal property to H., "the adopted daughter of my deceased husband." Held, that the recital of such adoption, being a declaration against the testatrix's interest, was evidence of the fact as against the devisee of the real property, and showed that the adopted daughter was entitled, as heir of the husband, to one-half of the land; also, if it was only secondary and the adoption papers the best evidence, the admission of the will without objection on that ground cured that defect in the proof. Id.

Witness.

Where it is not claimed that defendants were misled by their witness, or surprised at his testimony, they can not, with the view of discrediting him, read to him in the presence of the jury from his previous deposition in another proceeding, and ask him how he reconciles his testimony with the deposition. Parlin v. Miller, 190.

Writ of Error. See Appeal.

Ex. J. M.

5311 002 m.

HARVARD LAW L